

A STUDY OF JUDICIAL ADMINISTRATION IN THE STATE OF MARYLAND

BY
G. KENNETH REIBLICH

A DISSERTATION

Submitted to the Board of University Studies of the Johns
Hopkins University in Conformity with the Requirements
for the Degree of Doctor of Philosophy

1928

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BALTIMORE

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PREFACE

While the particular boast of the American States, following the lead of their English ancestors, has been the development of court systems where justice is administered freely without favor, fully without denial, and speedily without delay, not a little dissatisfaction has been expressed in recent years with the state of our law and its administration. Speeches have been delivered and articles written concerning the striking denial of justice to the poor, as also the inadequacy of our present instrumentalities for dealing with the problems of advanced civilization even when the parties involved can bear the costs. Nevertheless, while other fields of public administration have been carefully studied, little has been done by way of submitting to complete critical examination the whole system of judicial administration as it now exists in any particular State of the Union.

In view of these facts, the present study proposes to examine the existing agencies in Maryland for the administration of justice, to consider their functions and the extent to which they satisfactorily perform them, and to note instances where reforms might be introduced. This involves beginning at the bottom with the justices of the peace and proceeding to the highest tribunal, the Court of Appeals, and also considering the executive agencies that must necessarily enter into the working of any system. In most instances suggested reforms are not original with the author but are crystallizations of the thought and study of leading lawyers and students of judicial administration throughout the United States. No attempt is made to treat with the dual system of state and federal courts. Although that is a peculiar characteristic of our American system and one worthy of study, it presents a complete problem of its own.

The purpose of our study, while analytical and critical, is not to suggest dissatisfaction with the work of the courts in the past, which under the pioneer conditions of their creation has been truly laudable. It is rather, while recogniz-

ing their position as the "balance wheel of our whole constitutional system," to see whether this "new social age, a new age of human relationships, a new stage setting in the drama of life," may not require changes to maintain the same high degree of excellence. Our pride is that our government is one of law. Law, however, has been described as nothing more than the crystalized experience of mankind, embodied in principles that aim at the attainment of justice as between man and man and as between society and the individual. It follows directly from this conception that in the process of social development some adjustment of the law and its administration in the light of altered conditions and widened experiences is from time to time required. With this in mind, then, the following investigation proceeds.

The study was undertaken upon the suggestion of Professor Westel W. Willoughby and carried to completion under the inspiration received from him and the supervision of Dr. James Hart, to whom the writer wishes to express appreciation for valuable and stimulating criticism. Acknowledgment is especially given to Mr. W. F. Willoughby, whose lectures in judicial administration gave the writer his first training in the principles that have guided this work, and whose manuscript of an unpublished work on judicial administration has been a needed guide in this field of few landmarks. Indebtedness is further recognized to those lawyers, public officials, and agencies who through conversation or correspondence have greatly aided the development of this investigation.

While expressing appreciation for these direct aids in the carrying on of his work as well as for indirect aid obtained in the interesting and inspiring courses of Professor Frank J. Goodnow and Professor Walter Wheeler Cook, the writer wishes to recognize an influence of a different nature but equally as great in the success of any of his efforts. This work is dedicated, therefore, to his mother and father, by whose kindly guidance and aid all of his scholastic work has been made possible.

G. K. R.

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A STUDY OF JUDICIAL ADMINISTRATION IN THE STATE OF MARYLAND

CHAPTER I

PETTY TRIBUNALS

The judicial organization of Maryland in its present form dates back for its foundation to the State Constitution of 1867, which is the last of the series of constitutions that Maryland has had. It provides that "the Judicial power of this State shall be vested in a Court of Appeals, Circuit Courts, Orphans' Courts, and such courts for the City of Baltimore as are hereinafter provided for, and Justices of the Peace."¹ After this general statement the Constitution provides for the details of the judicial organization as we have it, and the whole system is to be found in the Constitution and its amendments with certain statutes that work out the details as allowed by the Constitution. The whole can best be treated by dividing it into three classes: petty tribunals, tribunals of intermediate grade, and the Court of Appeals, which are classes into which the courts of any State in this country may be conveniently divided and which therefore give a good basis for comparative study.

The petty tribunals may again be roughly classified as justices of the peace, police magistrates, the People's Court of Baltimore, the Juvenile Court of Baltimore, the Traffic Court of Baltimore, and like tribunals of petty jurisdiction as provided for throughout the State. The justice of the peace is the lowest rung of the judicial ladder in the counties and was in Baltimore City until urban needs required so many changes that now a completely new system has been installed, although the justices are still appointed. The governor, by and with the advice and consent of the Senate, appoints such number of justices for each election district in

¹ The Maryland Constitution, Art. 4, Sec. 1.

the counties as may be provided for by the public local laws of each county.² These justices, within the extent of their jurisdiction, may hear matter in controversy between any two parties, and upon full hearing of the allegations and evidence of both parties, give judgment according to the law of the land and the equity and right of the matter.³ The proceedings before them are summary and not hampered by special rules of procedure.

The justices hold office for a term of two years and are eligible for reappointment. They receive as a rule no fixed salary but are remunerated with fees for the various services that they perform,⁴ which fees are set out in table form for the various duties that a justice may perform. This, as I shall describe, has been one of the main points of attack against the justice system.

The jurisdiction of the justices is limited to the trial of petty civil and criminal cases. In civil cases it extends only to the trial of causes where the debt or damages claimed does not exceed \$100.⁵ Within this limit there are certain other exceptions because of the nature of the case. No justice has jurisdiction where the title to lands is involved, nor in actions for slander, nor to enforce any lien for work or materials furnished.⁶ In the counties, the circuit courts have concurrent jurisdiction with the justices where the amount claimed or the thing in action exceeds the sum or value of \$50 up to \$100, which is the limit of the justices' jurisdiction.⁷ In Baltimore City, there is no such concurrent jurisdiction provided for and the common law courts there have original jurisdiction only in cases where more than \$100 is involved,⁸ or where the suit is of such a nature that the justices have

² *Ibid.*, Art. 4, Sec. 42.

³ Bagby, George P., *The Annotated Code of Maryland*, 1924, Art. 52, Sec. 5, *Lyday vs. Douple*, 17 Md. 188.

⁴ *Ibid.*, Art. 36, Sec. 20 et seq.

⁵ *Ibid.*, Art. 52, Secs. 6, 9, *Ott vs. Dill*, 7 Md. 251; *Bushey vs. Culler*, 26 Md. 534; *Cooper vs. Roche*, 36 Md. 563.

⁶ *Ibid.*, Art. 52, Sec. 7.

⁷ *Ibid.*, Art. 52, Sec. 11.

⁸ *Schindel v. Suman*, 13 Md. 310.

no jurisdiction, in which cases the courts have been held to have inherited jurisdiction from the common law.⁹

The criminal jurisdiction of the justices extends generally to hear, try and determine all cases involving the charge of any offense, crime, or misdemeanor not punishable by confinement in the penitentiary or involving a felonious intent, which may be committed within their respective counties.¹⁰ They exercise this jurisdiction subject to the right of the accused, when brought before any such justice and informed of his right to have a trial by jury, to elect to have a jury trial, and subject also to the right of the State's attorney to pray a jury trial on the part of the State in criminal causes.¹¹ In the event that the accused desires a jury trial, the justice takes from him his recognizance with sufficient surety conditioned for his personal appearance to answer said charges at the next session of the Circuit Court of the County. It is true, however, that while in theory everyone has this constitutional right of trial by jury, in practice the accused usually has no knowledge or understanding of his right. The justice puts the choice to him in words such as "You want to be tried by me, don't you?" and the trial proceeds without further comment. Seldom does the accused say "No" and elect to have his case tried by a jury unless he has counsel or information other than that which he receives in the office of the justice.

In case of dissatisfaction with the judgment of the justice of the peace, appeal lies to the Circuit Court of the County. In criminal cases this appeal must be taken within ten days.¹² In civil cases, the parties are allowed sixty days during which to file an appeal.¹³ On such an appeal, whether civil or

⁹ *Legum v. Blank*, 105 Md. 126. When an action was brought in the Court of Common Pleas to recover \$75, but where title to land was concerned, it was held on an objection to the jurisdiction of the court that the court had a residuary jurisdiction of all cases not within the jurisdiction of the justices of the peace. The same jurisdiction was held to be in the two other common-law courts of Baltimore City, the Superior Court and the Baltimore City Court.

¹⁰ Bagby's Code 1924, Art. 5, Sec. 12.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, Art. 5, Sec. 92.

criminal, the case is tried "de novo" by the circuit court which has the power to determine the same according to the law, and the equity, and the right of the matter. In all cases of appeal from the decisions of the justices of the peace, the judgment of the appellate tribunal is final and conclusive and cannot be reviewed by the Court of Appeals provided the inferior court had jurisdiction of the person and the subject matter. If it appears affirmatively from the record that it had no such jurisdiction, its decisions may be reviewed and revised. For example, appeal will lie to the Court of Appeals from a judgment by the trial court on an appeal from a justice of the peace, where judgment is given by the trial court for more than \$100.¹⁴

In connection with the justices of the peace mention need be made of the constables. These officers are appointed for a two years' term for the several election districts and wards by the county commissioners in each county and the mayor and common council of Baltimore City.¹⁵ They are conservators of the peace, serving as assistants to the sheriff in enforcing it. They act as executive officers of the justices of the peace, executing all process directed to them as well as serving and levying executions from any justice.¹⁶ They are specially charged with the duties of suppressing gambling, of seeing that peddlers (and liquor sellers) do not sell

¹⁴ *Herzberg v. Adams*, 39 Md. 309; *Darrell v. Biscoe*, 94 Md. 684. In this latter case, a justice of the peace issued a writ of replevin for a horse which was returned by the constable with an appraisement on which the horse was valued at \$90. Upon motion by the defendant to quash the writ, he offered evidence to show that the plaintiff and the appraisers as well as the magistrate knew that the horse was worth more than \$100 and that the appraisement was placed at \$90 solely for the purpose of giving to the justice jurisdiction to try the case. Held as regards right to appeal: "The decision of the Circuit Court upon an appeal from the judgment of a Justice of the Peace is ordinarily final, yet if the justice and consequently the Circuit Court on appeal were without jurisdiction of the case an appeal lies to this Court (the Court of Appeals) from the judgment of the Circuit Court."

¹⁵ Maryland Constitution, Art. 4, Sec. 42, *Little vs. Schull*, 118 Md. 460.

¹⁶ *Bagby's Code* 1924, Art. 20, Secs. 4-14. See whole article for a general discussion of constables.

without license, and of inspecting measures used by shopkeepers.¹⁷ The law prescribes their number, pay, and duties, and all these vary more or less with each county. In general, they are still paid by fees throughout the counties but are put on a salary basis in Baltimore City.¹⁸

That completes a more or less general description of the justices of the peace as they exist throughout the counties of Maryland. They are indicative of a hangover from the English system and are the organs of a remote civilization trying to function in a modern one. That the oft-repeated attacks upon them as the weakest part of the judicial system is finding favor may be seen from the successful attempts to establish other petty tribunals in all the urban districts.

In Baltimore City there is a completely new system, and although the old justices of the peace are still appointed, they stand stripped of practically all of their jurisdiction. The governor, by and with the advice and consent of the Senate, appoints twelve justices of the peace from each of the legislative districts of Baltimore, selecting one from each of the wards comprising each of the said districts, and six justices of the peace at large from each of said districts, and further appoints twelve justices of the peace from Baltimore City at large.¹⁹ From this number, the governor selects a justice to sit as Police Magistrate at each station house in the City of Baltimore (there are eight such Police Courts) and in addition, two Police Magistrates at large. These magistrates take over most of the criminal jurisdiction that we find vested in the justices of the peace in the counties.²⁰ The men appointed as justices of the peace throughout the City still issue writs and warrants in cases of petty crimes or misdemeanors, but no fee can be charged for them, and they must be made returnable before one of the police station justices, who alone have jurisdiction to hear the charges.

¹⁷ *Ibid.*, Secs. 22-26.

¹⁸ Acts 1912, Ch. 823.

¹⁹ Acts 1912, Ch. 777. Public Local Laws Baltimore City, Art. 4, Sec. 630 et seq.

²⁰ *Ibid.*

These police magistrates hold office for indefinite terms, subject to the will of the governor, who may change the appointments when he chooses.²¹ They are paid, by act of the Legislature in 1927, a salary of \$3500 per annum,²² payable monthly. Their salary was formerly \$2500 per annum.

The civil jurisdiction of the justices remained the same in Baltimore City until 1912, when, with the establishing of the People's Court, the modern system began.²³ The Legislature empowered the governor to select five justices, one chief justice and four associates, to sit in a central location to try all civil causes within the jurisdiction of the justices of the peace. They were to receive salaries in lieu of all fees, and any writ issued in a civil suit by any justice throughout the City might be made returnable before the Presiding Justice of the People's Court, or any suit before any justice might be removed to the People's Court for trial by presenting a request in writing for such removal. Justices other than those of the People's Court were by the terms of the Act given a salary of \$10.00 a year in lieu of the costs theretofore provided for their work. The legislation was upheld by the Court of Appeals²⁴ and its effect has been to concentrate in the People's Court all such civil litigation as had previously been conducted before the various justices of the peace throughout the City.

The People's Court as now existing under amendment of 1927 consists of one chief justice, with a salary of \$4,000 per annum, and four associates, each with a salary of \$3,500 per annum, payable monthly.²⁵ They sit for trial of cases on each day (except Sunday and legal holidays) from 1 o'clock p. m. at such proper place in or near the Court House in Baltimore City as may be provided by the Mayor and City Council of Baltimore.²⁶ One or more of the justices as

²¹ *Ibid.*, Sec. 635.

²² *Ibid.*, Sec. 636, as amended by Acts 1927, Ch. 348.

²³ Acts 1912, Ch. 823.

²⁴ *Levin v. Hewes*, 118 Md. 624.

²⁵ Acts 1927, Ch. 346.

²⁶ The People's Court now sits in the top of the market building at the wholesale market at Baltimore and Market Streets.

assigned by the Presiding Justice is on duty from 9 a. m. until 12.30 p. m., for the purpose of issuing summons and performing any other duties, except the trial of cases. Cases, however, may be tried at any hour upon the joint consent of all the parties and of the Justice.

Thus we see the result of the attempts to meet the modern needs of a large city by superimposing a new structure upon the old. Similar attempts have been and are being made in the larger towns throughout the counties. In almost all the towns of any size, there are now sitting one or more police magistrates exercising the sole criminal jurisdiction for their particular town. They represent a concentration of responsibility and control in the hands of a salaried official which prevents much of the abuse possible under the older system. We may take Baltimore County as an example. There we find committing magistrates sitting at Catonsville, Towson, Pikesville, Essex, Fullerton, Dundalk, and Halethorpe, each exercising sole jurisdiction to hear criminal charges within their jurisdiction, as the police magistrates of Baltimore City.²⁷ The first four are paid \$125; the one at Fullerton, \$100; and those at Dundalk and Halethorpe \$75 per month in lieu of any charges in criminal cases or duties as committing magistrates. However, they still may collect civil fees and other fees as always allowed by law. Similarly, throughout the other counties, police magistrates have been established in urban areas on a salary basis as regards their criminal jurisdiction. There is no attempt, however, to have any degree of uniformity in the system, but each locality depends on the passage of a special local law for whatever organization it has.

The civil jurisdiction in petty causes in the counties remained in the hands of the justices, as described at the beginning of this chapter, until the 1927 session of the Legislature made changes for certain localities. Then, however, several laws were passed providing for People's Courts at

²⁷ Acts 1927, Ch. 102, amending and restating all prior acts.

Salisbury,²⁸ Cumberland,²⁹ and Rockville.³⁰ For Salisbury, the governor is to appoint one justice, to be known as The Judge of the People's Court, for a term of two years, with a salary of \$2,400 a year (\$150 a month from the county and \$50 from the City of Salisbury). This justice is to be police justice for Salisbury and have the sole criminal jurisdiction formerly vested in the justices of the peace (who are no longer to be appointed for the districts comprising Salisbury). His civil jurisdiction extends to causes of the same nature as those formerly handled by the justices of the peace but the limit is raised to \$300. Up to \$50, the People's Court has exclusive jurisdiction. Over that amount and up to \$300 it is concurrent with that of the Circuit Court for the county. The statute further provides for practice before the said court, and for appeal to the Circuit Court for Wicomico County in cases of dissatisfaction with the judgment of the Judge of the People's Court.

The Act pertaining to Cumberland establishes a People's Court of two judges, who must be qualified to practice law and must actually have practiced three years, appointed by the governor for a two-year term and at a salary of \$3,600 a year (payable monthly, \$250 from Allegany County and \$50 from the City of Cumberland) in lieu of all fees in both civil and criminal cases. These two justices sit individually and not "in banc," each sitting six months of the year as police magistrates for Cumberland, to try cases arising under the charter and ordinances of the city as well as petty offenses and misdemeanors. Like the court for Salisbury, its civil jurisdiction extends up to \$300, but its exclusive jurisdiction extends up to \$150, and above that and below \$300 is the concurrent area. The Act lays down rules of practice for the court, and provides for appeal to the Circuit Court for Allegany County.

For Rockville, the governor is given power to appoint one justice at large for Montgomery County to act as Police

²⁸ Acts 1927, Ch. 329.

²⁹ Acts 1927, Ch. 797.

³⁰ Acts 1927, Ch. 321.

Court to sit in Rockville and to possess concurrent civil jurisdiction with the other justices of Montgomery County, and criminal jurisdiction concurrent with Circuit Court over petty offenses. This justice is to receive a salary of \$3,000 a year to be paid by the county.

Two other Acts passed by the Legislature in 1927 affected the civil jurisdiction of county justices. It is provided with regard to Frostburg in Allegany County that there shall be appointed by the governor two justices of the peace at large, and no others, with salaries of \$1,200 each in lieu of all criminal fees with same authority in civil and criminal cases as heretofore, except that their civil jurisdiction shall extend up to \$200 and they shall sit six months, each in turn, as police magistrates for the Mayor and City Council of Frostburg.³¹

An Act for Garrett County makes no change in the justice system as such but raises the jurisdiction in civil causes to \$200.³²

These experiments on the civil jurisdiction of the justices are too recent for one to tell how they are going to work out, but there is no reason why this attempt to relieve the courts of higher grade of a few more petty cases should not prove successful. The main criticism is that no attempt is being made to establish a uniform reform, but that all the new plans are different for each locality, whereas the problems are very much the same. A discussion in more detail of some plans that are being used to meet the demands of petty justice elsewhere will be given as a conclusion to this chapter.

Before proceeding to that, there are two special courts that must be considered in connection with the petty tribunals. First is the Juvenile Court of Baltimore City. In 1902, a special tribunal was established in Baltimore City to handle all cases of juvenile delinquency. At the time there were only two other children's courts in the United States.³³ The experiment, however, has proved successful, and the court in

³¹ Acts 1927, Ch. 292.

³² Acts 1927, Ch. 13.

³³ Chicago 1899, Denver 1901.

addition to relieving the regular courts of a great deal of work has proved a more satisfactory means of taking care of the work to be done.

The original Act has had several additions, the last one provided by the 1927 session of the Legislature,³⁴ which summarizes and amends the Act establishing the court itself, as well as providing for the appointment of two additional probation officers for the court. As existing under this latest amendment, the court consists of a judge, an associate judge, eight probation officers, a clerk, and a typist, as well as two or more police officers especially detailed thereto by the Police Commissioner for Baltimore City. The governor appoints the judge as an additional Justice of the Peace from Baltimore City at Large at a salary of \$3,000 a year, payable monthly, and the associate judge either from the existing justices of the peace or as an additional justice at a salary of \$2,000 a year. Both must be members of the bar of the Supreme Bench of Baltimore City. The Judge possesses "the general powers of police justice of the peace or justice of the peace selected to sit at a station house in the City of Baltimore,"³⁵ and "exclusive jurisdiction where jurisdiction is given by law to any justice of the peace in Baltimore City, in all cases of trial or commitment for trial, or commitment to any juvenile institution of any minor under the age of sixteen years."³⁶ The probation officers are appointed by the Supreme Bench of Baltimore City, and are assigned by the Judge of the Juvenile Court to work on the various cases arising as well as to the task of visiting the various juvenile institutions. The clerk and typist are appointed by the judge of the court.

The volume of business done by the court is very great, and the amount of supervisory work more than the probation officers can take care of with any degree of efficiency. In the number of cases handled by the court, statistics show an

³⁴ Acts 1927, Ch. 516.

³⁵ Acts 1927, Ch. 516.

³⁶ *Ibid.*

increase from 2,048 in 1910 to 3,350 in 1920.³⁷ The number of children that the probation officers are called upon to supervise averages from 450 to 500 throughout the year.³⁸ The addition of two officers made by the Act of 1927 will aid much in the adequate supervision of these cases but there is room for administrative improvement of the work. There is no Chief Probation Officer in the group and it is a generally admitted fact that the work suffers from lack of administrative direction. There is also some question as to whether more efficient work could be done if the court, instead of being an independent establishment, were organized as a part of the Criminal Court or as part of an entirely unified system. At present, there is little if any coordination between the probation activities of the Juvenile and the Criminal Court, although frequently members of the same family are in the care of each group.

Special courts for juvenile causes have been established also in Hagerstown and Cumberland, the latter in 1914,³⁹ and the former in 1924.⁴⁰ The nature of the duties to be performed by these courts is the same generally as in the Juvenile Court of Baltimore City, and the courts are modeled on that of Baltimore City and involve the same problems of organization and control.⁴¹

The other special tribunal of this grade that merits consideration is the Traffic Court of Baltimore City. In 1918, the Legislature, moved by the pressure of the increased busi-

³⁷ Quarterly Report Baltimore Criminal Justice Commission, June 1923, p. 10.

³⁸ Annual Report Baltimore Criminal Justice Commission, 1923, p. 30.

³⁹ Acts 1914, Ch. 701.

⁴⁰ Acts 1924, Ch. 36.

⁴¹ A recent treatment of the Juvenile Court movement in the U. S. is a publication submitted as a dissertation in the Department of Political Science in Columbia University by Herbert H. Lou, *Juvenile Courts in the United States*. At the present time, every state in the Union save one—Wyoming—has a probation law for children or applicable to children, and all but two states—Maine and Wyoming—have juvenile court laws. Juvenile courts were also established in four of the territories of the United States: Hawaii, 1909; Alaska, 1913; Porto Rico, 1915; and the Philippines, 1925.

ness in the courts resulting from the violations of traffic ordinances, established a tribunal to relieve the regular courts of this work.⁴² The Act establishing the court was repealed and reenacted in 1927, raising the salaries of the officials throughout and describing the Traffic Court as now existing.⁴³ It consists of one Chief Judge and two associates appointed by the governor as additional justices of the peace from Baltimore City at large. They must be of high moral character and reputable members of the Bar of the Supreme Bench of Baltimore City and have been actually engaged in the practice of law for at least five years in order to be eligible for appointment. The Chief Justice of the Peace of the Traffic Court receives a salary of \$4,000 per annum and the Associate Justices \$3,500 per annum, payable monthly, and no other compensation or fees whatever for the performance of any duty required by law. The court is divided into separate parts, with one of such justices sitting in each part, and is in session every day except Saturdays and holidays. It has exclusive jurisdiction within the City of Baltimore to hear and determine all complaints of violations of the Motor Vehicle Laws of the State, exclusive jurisdiction when jurisdiction has been or may be given to any justice of the peace in Baltimore City to try or commit for trial any person accused of violating any of the Traffic Ordinances of Baltimore City, and concurrent jurisdiction with justices of the peace, committing magistrates, or police magistrates throughout the State outside of Baltimore City, to hear and determine all complaints of violations of the Motor Vehicle Laws of the State in those cases when it is convenient for the accused to have such complaint heard and determined in Baltimore City. The Act provides for the appointment of clerks and police officers for the Traffic Court by the Police Commissioner and for the payment of the expenses of the Court by the Commissioner of Motor Vehicles, to whom the court must make account for all fines, forfeitures, penalties,

⁴² Acts 1918, Ch. 85, Sec. 159, Codified as Art. 56, Sec. 205, Code 1924.

⁴³ Act 1927, Ch. 120.

fees, and costs collected. Also, the governor appoints an additional justice at large, with the same qualifications as the others, who is to sit at such times as designated by the governor in case of absence of one of the other justices because of illness or otherwise. This substitute justice receives a salary of \$1,500 per annum.

In cases of dissatisfaction with any decision of the Traffic Court, the aggrieved person may file an appeal within ten days to the Criminal Court of Baltimore City, which shall hear the case "de novo."⁴⁴

During the ten years that the Traffic Court has been in existence there has been a steady increase in the number of cases handled by it, due probably to the increase in traffic and in the number of ordinances of the city being passed to control it. A typed statement obtained from one of the clerks of the court gives this volume of business as follows:

Number of cases disposed of:

June 1, to Dec. 31, 1918.....	7,199
Jan. 1, to " " , 1919.....	11,162
" " " " 1920.....	14,727
" " " " 1921.....	15,103
" " " " 1922.....	18,314
" " " " 1923.....	22,489
" " " " 1924.....	33,170
" " " " 1925.....	39,068
" " " " 1926.....	44,275
" " " " 1927.....	54,859

In the beginning, practically all offenses were for violating the State Motor Vehicle Laws, but now most of the business probably results from violation of the traffic ordinances of Baltimore City. On account of the great increase of business, the record of each offense that was kept on a card under the name of the violation so that the judge might have at his finger tips a complete record of every defendant and thereby be prepared to treat more severely chronic offenders has been neglected. This constitutes one of the greatest defects in the court's work at present. Chronic offenders continue to pay the minimum fine for each offense and continue to violate

⁴⁴ Bagby's Code 1924, Art. 56, Sec. 204.

the law. A more severe treatment for second offenses would have a much greater preventive effect.

The work of the court, however, has been commendable, and there is no doubt but what the certainty of punishment in case of violations of the traffic laws has done much to insure the safety and convenience of motorists.

The system of administering petty justice in Maryland as described above presents an interesting cross section of what is the situation in many states. Need for new means of handling the situations of modern society has been felt and haphazard attempts have been made to meet it. Special features have been added to an old system, but no attempt has been made to establish a new and modern system from the bottom up. Whether this would be possible or advisable is a question for argument. However, that the justice of the peace on a fee basis is an office that has outlived its value is the consensus of opinion of almost all the writers that have treated the subject. That this phase of the subject merits more consideration than has been given it by most jurists and lawyers is also recognized by these writers. That it can be more effectively handled has been proved by the success of conciliation measures and "small claims procedure" Acts in other States. A few quotations from these authors and a study of some of the other State plans will not be inappropriate.

One leading writer on State government has the following to say: ⁴⁵

One of the chief difficulties with the administration of justice in the states is that which centers around the justice of the peace. When the conditions of the country were distinctly rural, when people lived at great distances from each other and the means of transportation were slow and difficult, there was necessity for an untechnical court which should settle controversies promptly and according to common sense rules. There is still need for such an organization, for today the greatest difficulties in the administration of justice are those of technicality and delay. But, with changed conditions and with rapid means of communication, the justice of the peace has proved unsatisfactory. In substantially all of the states, justices of the peace are elected in large numbers and must rely upon fees for their compensation. The fee system of compensating officers has

⁴⁵ Walter F. Dodd, *State Government*, 342.

almost disappeared; but here it holds undisputed sway, and has resulted in intolerable abuses. A justice of the peace who is honest, and who merely exercises his office for the convenience of his neighbors, may still have an important place in the judicial system; but justices of the peace are numerous and many of them desire to make a profit from their office. With each justice of the peace exercising jurisdiction over a whole county, the system of that county is as bad as its worst justice. In order to make a profit a justice of the peace must obtain business. For this reason justices of the peace have come to be regarded as always likely to render their judgment in favor of the plaintiff in civil cases. In criminal cases, justices, must get business, and must find the accused guilty in order to obtain compensation from such business. This situation has almost necessarily led in many cases to collusion between justices on the one hand and constables or other local police officers on the other. The widely extended use of the automobile has brought the defects of the justice system to the attention of an increasing number of people, and has shown its ineffectiveness as a means of just and efficient administration of traffic laws and regulations. The justice system became so intolerable in larger communities that it has been replaced by municipal courts in many cities; and justices have been placed upon a salary basis in the larger communities of Washington and California.

The just decision of petty cases is the most important task of judicial organization, and a decision of these cases can not be left to an untrained judge, who must necessarily decide them according to the fees which he anticipates, and from whose decision an entirely new trial may be had in a higher court. It is not enough to say that if a justice of the peace acts unfairly a new trial may be had in a higher court, for new trials are expensive and cause delay, and the denial of justice in the country today is due primarily to delay and expense. The poor litigant can not afford the expense of a new trial in a higher court in order to escape the injustice of a lower tribunal. The whole tendency has been to neglect, not only the justice of the peace as the lowest tribunal, but the general court of trial jurisdiction, and to place emphasis upon appeals to the supreme court or to an intermediate appellate court. Justice delayed is justice denied; for witnesses die or move away, and a case that had merit if brought to an immediate trial, fails many times because of delays due to the congestion of the courts, or a new trial or appeal from the justice of the peace or from the further fact that cases in general trial courts are frequently reversed and returned for retrial.

Regarding the system of having petty cases handled by justice of the peace courts, Judge Baldwin has written:

The weakest point in this system of judicial organization is the vesting of jurisdiction of small civil cases in Justices of the Peace. Of these there are generally several in each town having jurisdiction over the whole country. Some may be lawyers. None need be and few are. Any one of these can try cases. Which of them can try any particular case is left to be determined by the lawyer who brings it.⁴⁶

⁴⁶ American Judiciary, 129-130.

Judge Baldwin points out that in his opinion these magistrates can more readily be trusted in respect to such matters as the trial of petty criminal cases and conducting preliminary hearings, and goes on to say:

But in civil cases for the lawyer who initiates them to pick out his judge at will from a number who are equally competent to assume jurisdiction and at the same time (as is generally the law) are left wholly without salaries, receiving nothing except fees for cases actually brought before them, is to place the defendant in a much less favorable position than the plaintiff. If the justice decides in the favor of the latter he is obviously more likely to get the subsequent patronage of his lawyer. In most justices' suits judgment does go for the plaintiff and not infrequently it is to be feared that he gets it from that consideration. Some justices rarely give any other judgment. Many lawyers bring all their cases before one justice and seldom fail of success. A system in which such things are possible is inherently vicious and only endurable because the defeated party can always appeal and have a new trial before a higher court. That relief, however, is expensive. Judgments ought to be just in the first instance and it is the business of governments to insure this so far as they reasonably can.

An editorial in *Law Notes*⁴⁷ adds a touch of realistic humor in mentioning that in some places where the justice of peace courts are at their worst, the aphorism is that J. P. stands for judgment for plaintiff.

These criticisms, of course, were directed at the system in general, but many of them are applicable to the situation in Maryland. The criticism of having the officers elective is on its face inapplicable. On the other hand, there is some question as to whether the political appointees, as they undoubtedly are, are any more desirable. It is, in the writer's opinion, the lesser of the two evils to have them so appointed. It is true, however, that most of the justices throughout the counties are on the fee basis of payment and many of the criticisms of Dodd and Baldwin are applicable to them. Any attempts at reform, as mentioned above, have been haphazard, and it is doubtful if such a method of attack can ever give desirable results.

A proposed remedy for the justice of the peace situation may be found in the *Journal of the American Judicature Society* for June, 1927.⁴⁸ It claims that all that is needed

⁴⁷ *Law Notes* 4, No. 10, 185.

is to have justices appointed (Maryland already has this), to pay them salaries, and to put them under the supervision of a real judge. With modern means for transportation only a few are needed in the average county. They should have power to issue warrants, to try misdemeanors involving fines of a small amount, and to try civil cases under certain limitations. For instance, they might well try cases involving up to \$500 by consent of both parties. In the absence of consent, the case should be removed to the county seat. There should also be provision for a change of venue on showing made to the county or district judge. The justices should be deputies of the county judge to the extent of their powers and should be supervised by him. This relationship would be furthered by providing that they be appointed by him with the consent of the county board. If there be no county judge, a district judge could be made responsible for supervising the people's intimate courts.⁴⁹

This proposed remedy sounds very workable and in keeping with the theory of centralization of control and responsibility. Such an organization of a county court under a competent judge, handling, with the assistance of a number of deputies, all such petty causes could be very usefully coordinated in a system such as implied in the newer ideal of a unified State court system, which will be treated later in this work.

In Baltimore City, the system cannot be criticized from the same angle as was the old justice system, but there is much to be said in favor of change even there. The Criminal Justice Commission after a careful study of the system of Police Magistrates in 1923 resolved that it was inefficient and expensive for the results obtained. An extended quotation from the report of the commission is justified by its clear summary of the situation: ⁵⁰

⁴⁸ Journal of the American Judicature Society, June, 1927, p. 30.

⁴⁹ A full and more detailed account of this proposed system may be found in Vol. 3, Part I, p. 3, of the same journal.

⁵⁰ First Annual Report of the Baltimore Criminal Justice Commission (1923), p. 12.

The Committee is impressed by the following considerations:

1. Nine policies for dealing with crime exist in Baltimore—one in the Criminal Court and one each in the eight police courts. A certain lack of uniformity is, of course, inevitable when different judges hear the same type of cases, but no effort is made to overcome it in the police courts. The justices rarely, if ever, confer.

2. The Police Courts in Baltimore City, in 1922, heard and finally disposed of charges against 53,656 persons and sent 4,363 additional persons to the Criminal Court. The Criminal Court in the same period tried 6,404 cases. Thus 90 per cent. of the criminal cases were disposed of in the police courts. For most of the persons concerned, appearance in the Police Courts represented their only contact with the law and from this contact they got their impression of justice.

3. The work is very unequally divided between the eight police courts. It varied in one week from 25 cases for the week in the Northern District to 164 in the Eastern District. In one court for example during several sessions in a week the Magistrate had no business whatever to require his attention, while in others at times only 15 or 20 minutes were required to dispose of the sessions' business.

4. Only two of the police court rooms are in any respect suitable. The other six are poorly ventilated, dimly lighted, ill smelling, noisy, crowded, irritating rooms to which accuracy and patience are strangers. In the Eastern Police Station for instance, the Court Room is smaller than any other in the city, despite the fact that the volume of business there is greatest. Two windows in this 15 x 15 room would probably provide enough ventilation for half dozen persons. When it becomes packed to capacity with twenty or more people, the odors given forth by the perspiring throng, the 'morning after' smell of sickened inebriates and divers other breath and body stenches make the air foul. It is a room in which a hundred odors battle for supremacy: some are conquered but none die.

5. Among the most serious criticisms of the magistrates' courts are that the innocent and ignorant are frequently oppressed and that the guilty are not infrequently dismissed.

6. When a case is first heard the memory of the witnesses is fresh and little opportunity to tamper with them has been afforded. When two or three hearings of the same case must be had, delay is inevitable and the chance to influence witnesses for or against the accused is ready made for those disposed to take advantage of it. Multiple courts, too, mean a tremendous tax on the time of witnesses.

7. The group of cases in the police courts is of first importance in the effort to reduce crime. They are ten times as numerous as those in the Criminal Court. As a whole they menace the security of a vastly greater number of people. They involve the ignorant and humble, the poor and the friendless, the restless and discontented—in short the group from which serious offenders or the most part come. The most learned, skilled, patient, efficient and experienced judges that the community can produce are needed to try these cases.

8. The law prescribes that each police justice shall sit four hours on week days and two hours on Sundays and holidays. Actually the average time consumed each day in the trial of cases by the eight courts is two hours per court or sixteen hours for all of them.

9. The combined salary bill for police magistrates is \$25,000.00.⁵¹ Three capable full time judges could perform the work now done by the eight part-time men and the two Magistrates at large, and at a saving in expense. Impartial justice without delay would be promoted if all criminal cases were heard in one court with appropriate divisions.

10. Sufficient space for the conduct of a unified Criminal Court in Baltimore could be provided in the new police building for which funds were authorized in the election of November 1923.

The Committee therefore recommends that it be proposed:

FIRST: That so much of the statute law as now provides for the appointment, salaries, and duties of the station house justices of the peace in Baltimore be repealed and the jurisdiction and duties of these officers be conferred upon the Criminal Court of Baltimore.

The Committee feels that to take care of the Docket of the Criminal Court when thus increased it will be necessary to add, possibly, three new members to the Supreme Bench of Baltimore City. While Section 39 of Article IV of the Constitution states that 'The General Assembly shall, as often as it may think proper and expedient, provide by law for the election of an additional judge of the Supreme Bench of Baltimore City,' it is thought that the power of the General Assembly to create more than one additional judgeship at a time is open to serious question.

The Committee therefore recommends:

SECOND: That the Constitution be so amended as to permit the General Assembly to create more than one additional judgeship at a time and to authorize the Governor to appoint such additional judges until the next ensuing election.

The writer can heartily endorse this criticism of the Commission and its suggested reform. However, it has not met with favor in the eyes of the politicians of Maryland. The only change has been the raise in salary of the justices to \$3,500 a year, which, while not too high for the importance of the post, will under present conditions have little if any effect on the quality of the justice rendered. The magistrates are undoubtedly, with occasional exceptions, appointed upon political expediency at the behest of political leaders rather than for their fitness. Indeed, at the time of the report of the Commission, two of the group were for a time during their incumbency members of a political party committee.⁵² Of the ten serving at the time, only three were lawyers, while

⁵¹ The salary was raised in 1927, making this figure \$35,000. Above, p. 6.

⁵² First Annual report of the Baltimore Criminal Justice Commission (1923), p. 12.

the previous experience of the others in no way qualified them for their work.⁵³

During the time the Commission was investigating these courts, many articles appeared in the various papers of the city upholding the courts as necessary and effective organs. It is interesting to note that many of these articles were from well-known politicians throughout the city and that none of them give arguments that are satisfactory.⁵⁴

That politics enter very often into the decisions of the magistrate is recognized and spoken of as a usual thing by Frank R. Kent in his book *The Great Game of Politics*. In speaking of the precinct executive and how he keeps his votes for the party machine, he says: ⁵⁵

. . . If it is a case at the police station or the traffic court, he may not know the magistrate personally, but the ward executive does and he helps. That's the ward executive's business.

Often the things they have to ask of the magistrate are little things that he probably would do anyhow—let the boy off with a reprimand, fine the traffic violator \$5 instead of \$25, dismiss a harmless drunk with a warning. What the precinct executive, coöperating with the ward executive, does is to soften the hand of the law when it clutches his precinct people.

It is the conclusion of the writer that too long have the courts for the trial of minor infractions of the law been undignified, unsystematic, politically tainted makeshifts. It is in these courts that the beginning of many a hardened criminal's career might be checked and it is an indefensible policy that tolerates the trial of criminal offenses in them if a more efficient means can be provided.

The People's Court, handling practically all of the civil cases formerly tried by the justices of the peace, has come in for less criticism. Undoubtedly, with its salary-paid justices acting more or less in conjunction, it has been a vast improvement over the old system where justices on the "fee" basis scattered over the city meted out justice as they saw fit. The

⁵³ *Ibid.*

⁵⁴ The Commission's report, quoted in the text, answers the opposing arguments one for one largely in the terms of the conclusions cited.

⁵⁵ *The Great Game of Politics*, 30.

chief suggestion that one hears among lawyers in the city is that the upper limit of its jurisdiction might well be raised. This would do much to relieve the congestion in the other courts and the cases could just as well be handled in the People's Court if capable justices were kept in office.

Because of the usual expense and delay attached to all small claims actions under the system of justice as it existed (and as it still exists in Maryland), quite a few States have adopted new and expeditious procedure for the handling of all such claims. These various reforms may be grouped into two classes, those which fall in the "small claims procedure" Acts modeled on the plan adopted in Massachusetts, and those based on the "conciliation" plan of Cleveland. The various plans are worthy of brief consideration here.

Because Massachusetts was the first State to pass a State-wide Act of general application to all small legal actions, thereby making the small claims courts an integral part of its administration of justice, and since the Massachusetts law and procedure is in many respects the best thus far devised, a description of the situation there affords the best practical illustration of what the idea is, how it works, and what it accomplishes.⁵⁶

With both an industrial and rural population, great cities and small country towns, Massachusetts was faced with all the problems that make the administration of justice in this country peculiarly difficult. Despite the fact that the fees and costs were comparatively low and a great deal had been done to eliminate delays, there were yet many instances in which the poor litigant with a small case found the courts practically closed to him, because the fees for entry and service of process were more than he could afford and because of the expense of employing counsel to pilot his little case

⁵⁶ The description of the various small claims or conciliation acts that follows is taken largely from lectures delivered by Mr. W. F. Willoughby at the Johns Hopkins University during 1925-1926 and from two articles from the *Journal of the American Judicature Society*, "Conciliation is Succeeding," IV, No. 3, and "Small Claims Procedure is Succeeding," VIII, No. 1. Further footnotes are added only where a reference to other sources might be worthwhile.

through the intricacies of pleadings, evidence, and trial procedure. A specially appointed Judicature Commission after a thorough investigation reported the conditions very unsatisfactory and suggested the reform which after much opposition became in 1920 ⁵⁷ the basis of an Act of the Legislature which required the judges of every lower court throughout the State to establish, by rules, a special procedure and special session for the hearing of all small claims; not merely contract actions, but tort actions as well (other than slander and libel) where the amount claimed was \$35 or less.

The chief difficulty in the minds of the sponsors of the Act was the constitutional guaranty of right to trial by jury and the danger of the effects of the Act being modified by multitudinous appeals. To meet this, the Act provides that a plaintiff may sue in the regular way, but if he elects to use the small claims procedure (the plaintiffs are substantially unanimous in their preference) then he has waived his jury claim. The defendant may at the time of the trial similarly exercise his privilege and have the case removed to the Superior Court for jury trial, but if he fails to elect before the trial he, too, has waived. After both parties have submitted to the trial by the small claims procedure, there is no appeal. That the Act has gained the respect of most of the "petty" litigants so that there are few removals for jury trial may be seen from the fact that during 1921, 2,041 cases were entered in the small claims branch of the Boston Municipal Court and only six defendants exercised their right of removal.⁵⁸

The problem of appeal, which means delay and expense, and that of jury trial granted by most State constitutions must be met at the outset of any similar attempt at reform. The Massachusetts plan presents a good precedent to be followed wherever it is applicable. In most of the States that

⁵⁷ Mass. Acts of 1920, Chap. 553. For copy of the act and rules adopted for putting it into effect, see *Journal American Judicature Society*, April, 1921.

⁵⁸ Record of the proceedings of The Central Committee of the National Alliance of Legal Aid Societies on Dec. 15, 1922.

have adopted similar reforms in petty cases, the right of appeal has been limited. In Cleveland the small claims court's decision is final on the facts, while an appeal on law goes directly to the Court of Appeals. In California the decision is conclusive as to the plaintiff, but the defendant may appeal by giving bond to pay the judgment (if affirmed) and also a special fee of \$15 for the plaintiff's attorney. The systems of Idaho, Minnesota, and Oregon are substantially the same.

A short survey of the procedure of a case brought before the Boston court will illustrate the effectiveness and simplicity of the small claims court in general. The plaintiff with a grocery bill against the defendant goes to the clerk of the small claims branch. Many times the case would be settled right here or else dropped. In 1921, out of the 2,041 cases filed, 109, or 9 per cent., were settled by payments to the clerk.⁵⁹ If, however, an immediate settlement is not effectuated, the plaintiff tells of his claim and the clerk draws up a simple statement thereof, which is signed by the plaintiff and entered on the docket. If a *prima facie* case is not made out, it may go immediately before the judge, who will determine whether or not the claim will be received. There is an entry fee of \$1.00 in Massachusetts and the opinion seems to be that this is desirable.

After entry, the case is set down for a hearing within a week or ten days and the plaintiff is given a card stating the exact time and place. Notice, not in the form of an archaic writ but written in direct style, is sent by registered mail to the defendant, receipt requested. This eliminates expense and has been found as an effective means of service as by an officer of the court. In fact, the Cleveland court has found it so successful that it has discarded registered mail and used the ordinary two-cent mail, and adopted that as the regular method of service in all Municipal Court cases.

The Massachusetts procedure requires the defendant to file an answer. There is some controversy as to whether the delay and extra journey to court which this causes the defend-

⁵⁹ Ibid.

ant are paid for by the opportunity it gives the plaintiff to prepare for his defense. The question is one for experience to determine.

On the assigned date for trial, both parties appear (unless there be a default) and the judge conducts the hearing by direct conversation with the parties and their witnesses. The judge, unhampered by rules of pleading, evidence or procedure, attempts in the best way to determine the justice of the case. Much litigation grows out of misunderstanding; when that appears the judge may be able to remove it and there he uses the method of conciliation. More litigation grows out of the defendant's inability to pay and when he finds that he can pay in installments his denial often becomes a candid admission. In any event, the court makes a decision, which is entered as a judgment. If the defendant needs time, a stay of execution may be allowed.

It might be said, however, that the judge is not left to make an arbitrary ruling like an untrammelled despot, but he must rule according to law. The small claims courts administer justice according to "the principles of substantive law,"⁶⁰ wherein lies one distinction from conciliation procedure.

Following the passage of the Act in Massachusetts, four other States took steps to provide by statute for small claims procedure on a State-wide basis—California and South Dakota in 1921, followed in 1923 by Nevada and Idaho. In the same year the Iowa conciliation law was enacted providing that judges who adopt its provisions shall also "adopt rules for the speedy determination of causes involving comparatively small amounts as stated in such rules, and the clerk shall enter such rules upon a separate short cause calendar."

Before the passage of the Massachusetts Act and in some instances since, there were small claims courts established in particular localities in different States. Probably the first

⁶⁰ Justice and the Poor (published in 1919 as Bulletin 13 of the Carnegie Foundation), 51.

instance was the Kansas "Small Debtors' Courts" established by an Act on March 15, 1913,⁶¹ in Topeka, Leavenworth, and Kansas City. These courts, although productive of some good, are by no means satisfactory. Their jurisdiction is very limited, extending only to small debts and claims to the value of not exceeding \$20, thereby excluding all actions in tort; they are independent tribunals instead of being branches of existing courts, and the judge need not be a lawyer or even one skilled in the law.

In 1915, the Oregon Legislature created a special department in the District Court for Multnomah County for the adjudication of small claims.⁶² This court is in effect the Municipal Court for Portland. Although the Act follows the Kansas statute in some respects, it avoids some of the features of that Act which have been pointed out as undesirable. Mr. Reginald Heber Smith in his *Justice and the Poor* commends the work of the Portland Court.⁶³ Many thousands of cases are handled by it yearly with simplicity, cheapness and speed. In 1917, the provisions of the Act were extended to all the counties in the State.

The Chicago Municipal Court, by establishing in 1916 under its powers to determine its own organization and procedure, a special branch called the Court of Small Claims with jurisdiction up to \$35, entered the field of effective small claims justice. The success of this court justified the broadening of its jurisdiction first to \$100 and later to \$200. It is to be noted that the trial of cases falling within the jurisdiction of this court is not optional with the parties. All such cases are entered upon the docket of this branch and are tried there, unless a jury trial is demanded. When such demand is made, trial before a jury is immediately had, as special provision is made for juries to handle this class of cases. In point of fact, a demand for trial by jury is seldom made.

Similar to the small claims procedure Acts, but enough

⁶¹ Kansas Session Laws of 1913, C. 170, 291.

⁶² Oregon General Laws of 1915, C. 327.

⁶³ *Justice and the Poor*, 47.

different to merit some separate treatment, is the Conciliation Branch of the Cleveland Municipal Court and the courts modeled somewhat on it in Minneapolis, Philadelphia, St. Paul and Stillwater. Cleveland established its Conciliation Court as a branch court to the Municipal Court in March, 1913, and the experiment has been a success from the start, causing the other four cities mentioned above to follow as nearly as their conditions allowed them. Every claim involving not more than \$35 goes to the Conciliation Branch Court. Until 1920, the court had handled 36,000 cases, with only two appeals from its decisions. Every litigant has his constitutional right to demand a jury trial in another branch of the Municipal Court, but few applications are made for such transfer. For the first several years, 45 cents was the highest charge made for court costs and this fully repaid the court for its services. In recent years, with the decreased value of the dollar, the costs have run up to around 90 cents if a case goes the whole length of a hearing and judgment.

The procedure in the court is similar to that under the Massachusetts Small Claims Act, except that the conciliation feature enters. The claimant is directed to a clerk who is a lawyer and who hears his story. Often the clerk must tell the applicant that on his own story he has no case and this eliminates the expense of a hearing and trial. If there is a *prima facie* case, a memorandum of the nature of the claim is made, which memorandum stands in lieu of pleading and is embodied in the summons. The summons is mailed to the defendant. On return day the parties are asked, under rule of the court, whether there is any prospect of settlement; if there be such, the parties are requested to retire and negotiate. If they arrive at a settlement independently, the judge is notified and the appropriate entry is made on the docket. If, on the other hand, the parties fail to agree, they are asked to wait until all the cases on the call have been reached.

Where the judge's services are required, there is the simplest and most direct procedure. It takes but a short while for the judge to get the facts—the parties are put upon their

good behavior by the dignified air of the courtroom—and very often it takes but little suggestion from the judge to incline both of them to do, as well as demand, justice. Usually the parties acquiesce in the opinion of the judge as to their respective rights and leave the court without bitterness. If, on the other hand, they cannot agree the judge enters the judgment which the law of the case warrants.

For the Minneapolis Municipal Court with civil jurisdiction up to \$1,000, a conciliation judge was provided in 1917. The Act allows any cause within the jurisdiction of the court to be commenced in the Conciliation Branch upon the option of the plaintiff. If not more than \$50 is involved the judge has authority to render judgment even if the parties do not reach an agreement, but in larger cases he cannot render a judgment except by agreement of the parties.

On September 16, 1920, the Municipal Court of Philadelphia created a special branch known as the Conciliation, Small Claims, and Legal Aid Division. This division seeks to act as the friend of small litigants, first by seeking through the use of conciliation to bring the parties to an agreement, and, failing this, to decide the case after a hearing in which every effort is made to employ a summary and non-technical procedure. Incidentally, the Division gives advice to poor litigants who are unable to employ counsel. The annual report of the court for 1922 stated that in the twenty-seven and a half months that the Division had been in existence it had handled 8,477 cases.

This brief survey of the Cleveland Conciliation Court and two of the courts following in its train, as well as the "small claims" procedure in several States, is inadequate to show the real value of these organizations, but the writer hopes it indicates that advances are being made in the field of the administration of "petty" justice and that recognition is being given to the truth that this field is as important as the field where more money is involved.

How applicable any of the reforms in operation elsewhere would be to the present Maryland system, it is difficult to state. With the present system where there is no court

between the justice of the peace and the Circuit Court of the counties, the benefits of small claims procedure could not be conferred without some court reorganization. That some steps toward such reorganization would be advisable is the writer's opinion, banked on the success of the Massachusetts Act and the general criticisms of the justice of the peace courts as they are existing throughout the counties now. In Baltimore City, the whole matter might well be put under the control of the Supreme Bench⁶⁴ along with the jurisdiction that is now vested in the People's Court. It would tend toward unification and because of the centralized control would give greater administrative efficiency as well as promote better justice.

We cannot bring to a better close our discussion of this subject than by quoting the conclusions from the report of the Committee on Small Claims and Conciliation Procedure of the Conference of the Bar Associations, Delegates submitted at the annual meeting held in Philadelphia July 7, 1924:⁶⁵

1. Small claims procedure may be counted upon to give good results in a state which has a court of record of general jurisdiction in every county.

2. Small claims procedure is equally applicable to the civil courts of municipal corporations having salaried judges learned in the law.

3. In a state in which the judges of such courts are coördinated in an organization, even though a loose one, they can themselves exercise the rulemaking power to establish procedure supplementary to the statute. When there is no such coördination the Supreme Court of the State, or the judicial council, may be required to make and amend the rules of procedure.

4. Where these plans are inapplicable owing to the absence of the needed courts the Iowa plan⁶⁶ of conciliation and small claims procedure gives promise of usefulness.

5. In cities having a trial bench resembling that of Cleveland and

⁶⁴ See Chap. ii, 46.

⁶⁵ American Bar Association Journal, X, 832.

⁶⁶ This is a statewide plan of optional conciliation. The act allows judges of courts of record to adopt its provisions at will. When adopted the judge may make appropriate rules, appoint conciliators, or himself act as conciliator. The extreme flexibility of the act is further illustrated by the provision that rules shall be adopted by judges accepting the law for the speedy and informal hearing of small causes which are not adjusted at the private conciliation hearings.

Minneapolis a special tribunal may be designated by rule of court or by statute for informal procedure in the adjudication of small controversies. It may be called a small claims court or a conciliation court. Its procedural rules should be as brief as possible, leaving as great freedom as may be to the presiding judge. Resort to this branch should not be optional with the claimant.

6. Concerning the limit of jurisdiction in this field it is not possible to be dogmatic. It is obvious, and experience supports the expectation, that a higher percentage of success and satisfaction is to be attained in the smaller claims. A considerable increase in jurisdiction over \$50, for instance, will mean a growing inclination to litigate the claims in the traditional manner, with a loss of time and an increase in cost. Further experience is needed in respect to this important matter. Something will depend upon the attitude of the local bar and the power of the bar to control its membership. Of course if lawyers are rigidly excluded from such tribunals the amounts litigated should be kept down to a reasonable sum, possibly \$100.

7. Finally, the matter of excluding, or merely discouraging, the appearance of counsel, as a means for saving expense, cannot be arbitrarily determined. While in some places the morale of the bar will readily prevent unwarranted intrusion, in other places rules or statutes may be needed. If the quality of the judges is what it should be there will be a public confidence which will help to solve this problem. And long experience should also avail to form a proper habit.

These conclusions give the results of the investigations of men who were lawyers and students in this particular field. The conclusions are much in harmony with those of Mr. W. F. Willoughby, who in lecturing on the subject enumerated what he considered to be the more important requirements of a successful system for the handling of small claims as: "the organization of these tribunals as branches of existing courts instead of the creation of new independent courts, the elimination of the jury, the definite determination of the controversy through the denial or rigid restriction of the right of appeal, the reduction of expense to a minimum, the discouragement of the participation of lawyers, the use of an informal procedure in which little or no regard will be had to the technicalities pertaining to the offering of evidence, and the assumption by the judge of direct affirmative authority to control the hearing in all its aspects."

As these requirements are approached, the administration of justice in the lower tribunals will become more sure, speedy, and satisfactory.

CHAPTER II

TRIBUNALS OF INTERMEDIATE GRADE

Their Organization and Procedure

All judicial business, excepting that of a petty nature as described in the foregoing chapter, comes in the first instance within the control of those tribunals which we have classified as of intermediate grade to be discussed in this chapter. They comprise the courts of general common law jurisdiction for the counties and for Baltimore City and the Orphans' Court for the counties and the city.

The State of Maryland is divided into eight judicial circuits in manner following:¹

- I. Worcester, Somerset, Dorchester, and Wicomico² Counties.
- II. Caroline, Talbot, Queen Anne's, Kent and Cecil Counties.
- III. Baltimore and Harford Counties.
- IV. Allegany, Washington, and Garrett² Counties.
- V. Carroll, Howard, and Anne Arundel Counties.
- VI. Prince Georges', Calvert, Charles, and St. Mary's Counties.
- VII. Frederick and Montgomery Counties.
- VIII. Baltimore City.

For the first seven circuits, the system will allow of general description, while that for the eighth, or Baltimore City, will need separate treatment.

In each county of the State a court is held styled the Circuit Court for the County. These Circuit Courts are the highest common law courts of record and original jurisdiction within the State and each of them has full common law powers and jurisdiction in all civil and criminal cases within the county (except when by law the jurisdiction has been or may be taken away or conferred upon another tribunal) and also has and exercises in its respective county all the additional powers and jurisdiction which is or shall hereafter be prescribed by law.³

¹ Maryland Constitution of 1867, Art. 4, Sec. 19.

² Wicomico and Garrett Counties formed since the adoption of the constitution.

³ Md. Const. 1867, Art. 4, Sec. 20. Bagby's Code 1924, Art. 26,

With reference to the Circuit Courts, it may be observed generally that, like the old Circuit Courts which existed in Maryland prior and up to the adoption of the constitution of 1851, they can rightfully exercise all the powers exercised by the Court of King's Bench in England, so far as these powers are derived from the rules and principles of the common law, and are suited to the change of our political institutions and not modified by our constitutional or statutory enactments.⁴

They have also appellate jurisdiction in certain enumerated cases: in appeals from any decision or order of the County Commissioners,⁵ also from the determination of the County Commissioners in relation to the building or repairing of any bridge;⁶ also in appeals from the judgment of justices of the peace;⁷ and from the decisions of Orphans' Courts in matters pertaining to masters and apprentices.⁸ In all cases when appellate jurisdiction is given to them their decision is final, unless a further right of appeal to the Court of Appeals is expressly given.⁹ Likewise, when a special and limited jurisdiction is conferred upon them to be exercised in a particular mode, and not according to the course of common law, no appeal will lie from their judgments, unless expressly given by statute.¹⁰ Where their jurisdiction is disputed, however, a writ of error may be resorted to for the purpose of determining that question.¹¹

The Constitution of 1867 conferred upon the Circuit Courts created by it all the powers which the then existing Circuit Courts possessed. These included, in addition to the

Sec. 28. *Main v. Fessler*, 89 Md. 469. As to the concurrent jurisdiction of the justices of the peace see above, pp. 3-5, or *Bagby's Code* 1924, Art. 52, Sec. 11.

⁴ *Price v. State*, 8 Gill. 295.

⁵ *Bagby's Code* 1924, Art. 5, Secs. 90-91.

⁶ *Ibid.*, Art. 25, Secs. 34, 35, 36.

⁷ *Ibid.*, Art. 5, Secs. 1, 92-104; Art. 52, Secs. 77, 12.

⁸ *Ibid.* Art. 6, Sec. 2.

⁹ *Todd v. Frostburg*, 141 Md. 693.

¹⁰ *Ludwig v. County Commissioners*, 131 Md. 351; *Shanahan v. Maulsby*, 129 Md. 493.

¹¹ *N. Y. Mining Co. v. Midland Co.*, 99 Md. 506; *Hopkins v. P. W. & B. Rr.*, 94 Md. 257.

powers and authority exercised ordinarily by the King's Bench of England, and the appellate powers listed above, such further functions as might be vested in them by the Code. Reference to the Code will show that these consist of the following listed powers with or without appeal from the decision of the Circuit Court as stated:

1. In the cases of inebriates to summon a jury to inquire into the facts, as in the cases of parties alleged to be lunatic and insane, and to pass such orders for the protection of the property and custody of the person of the alleged drunkard as the circumstances may require.¹² No appeal is provided for.

2. To have full jurisdiction in cases of insolvency.¹³ (This is in Court of Common Pleas in Baltimore City.) Right of appeal is expressly given.¹⁴

3. To have special jurisdiction in cases of lunatic and insane persons.¹⁵ (This is lodged with the Criminal Court in Baltimore City.)

4. To issue all writs of mandamus.¹⁶ Appeal is specially provided for.¹⁷

5. Special jurisdiction in cases of mechanics liens.¹⁸ Here an appeal is, by implication, allowed and in practice is never questioned.¹⁹

6. In special cases of "quo warranto," jurisdiction to inquire whether a commission has been inadvertently issued to any officer who, at the time of his election or appointment, was a defaulter to the State.²⁰

7. In cases of application or remonstrance, authority to withdraw the license of any ordinary keeper, or retailer keeping a disorderly house.²¹ No appeal is allowed in these cases.

8. In cases of contested elections not otherwise provided

¹² Bagby's Code 1924, Art. 16, Secs. 52-54.

¹³ Ibid., Art. 47, Sec. 1.

¹⁴ Ibid., Art. 47, Sec. 31.

¹⁵ Ibid., Art. 59, Sec. 1.

¹⁶ Ibid., Art. 60, Sec. 1.

¹⁷ Ibid., Art. 5, Secs. 3, 48; Art. 60, Sec. 121.

¹⁸ Ibid., Art. 63, Secs. 17-19.

²⁰ Ibid., Art. 69, Secs. 4, 5.

¹⁹ Ibid., Art. 63, Sec. 41.

²¹ Ibid., Art. 71, Sec. 3.

for in the Constitution.²² In these cases an appeal is now allowed.²³

9. Special jurisdiction on removal in the case of suits before justices of the peace against executors and administrators, where allegation in writing is made under oath that the executor or administrator has no assets in his hands or that he has reasonable cause to believe the assets will not be sufficient to pay the debts of the decedent.²⁴ (This jurisdiction is in the Baltimore City Court in Baltimore City.)

10. Special jurisdiction to confirm or set aside tax sales.²⁵ No appeal lies here for the reason that the law confirming this jurisdiction upon them makes no provision for appeal.²⁶ (This same jurisdiction is in Circuit Court No. 2 of Baltimore City.)

11. Full and complete equity jurisdiction.²⁷

After this brief summary of the general and special jurisdiction of the Circuit Courts of the counties, a consideration of their organization is necessary. For each circuit (except the third and eighth) a chief judge (who is by virtue of his office a member of the Court of Appeals)²⁸ and two associate judges are elected by the qualified voters of the counties comprising the circuit for terms of fifteen years.²⁹ The eighth circuit is Baltimore City for which special provision is made, while in the third which is Baltimore and Harford Counties, there are three associate judges instead of two.³⁰ No two associate judges may be elected from the same county (except in the third circuit), and if two such

²² *Ibid.*, Art. 33, Secs. 141, 142.

²³ *Warfield v. Latrobe*, 46 Md. 123.

²⁴ *Bagby's Code* 1924, Art. 52, Sec. 10.

²⁵ *Ibid.*, Art. 81, Sec. 61.

²⁶ *Meyer v. Steuart*, 48 Md. 425; *Hull v. Southern Development Co.*, 89 Md. 11.

²⁷ Maryland Constitution, Art. 4, Sec. 20.

²⁸ Maryland Constitution, Art. 4, Sec. 14.

²⁹ *Ibid.*, Sec. 21. Further discussion of the judges as well as the clerks, constables etc. will be found in the next chapter "Tribunals of Intermediate Grade—Their Problems," which the writer has thought necessary in order to treat special problems that could not be handled in the present chapter.

³⁰ *Ibid.*

are candidates only the one receiving the highest number of votes can be elected, even though there should be two vacancies. If there is a tie between two candidates from the same county and they are leading other candidates for the judgeship there must be a new election.³¹

These judges for each circuit hold courts in the various counties comprising their circuit by traveling from one county seat to the other, from which practice their name is derived. At each county seat, there is a clerk of the Circuit Court for that county³² elected by the qualified voters of that county for a term of six years who, along with such deputies as he may appoint to assist him subject to confirmation by the judges,³³ tends to keeping the business of that court in running order. In each county there must be held yearly two jury terms and if there are only two such terms, two other non-jury terms in addition.³⁴ The judges may alter or fix the time for holding terms, until the general assembly provides otherwise, and may also make rules for the non-jury business of the intermediate terms.

One judge is a quorum of the court to hear cases and carry on business; but, where a trial is conducted by less than the whole number of circuit judges, on the decision of any point, the party against whom the decision is made may have the point reserved for the consideration of the three judges sitting as a court "in banc" for this purpose under rules that they may make for the hearing of such "reserved" issues.³⁵ Questions may not be reserved, however, on appeals from the decisions of justices of the peace, nor in criminal cases below the grade of felony, except when punishable by imprisonment in the penitentiary or State prison.

The salaries of the judges as raised by the legislature in 1927 are now \$11,000 per annum for the chief judges and

³¹ Ibid.

³² Ibid., Sec. 25, see below, p. 59, for removal of the clerk for failure to properly perform his duties.

³³ Ibid., Sec. 26, see below, p. 59.

³⁴ Ibid., Sec. 21.

³⁵ Ibid., Sec. 22.

\$8,500 per annum for the associate judges on the circuits throughout the counties.³⁶

The system specially provided for Baltimore City may be briefly outlined as follows:³⁷

The Supreme Bench of Baltimore City.
The Superior Court of Baltimore City.
The Court of Common Pleas.
The Baltimore City Court.
The Criminal Court of Baltimore.
The Circuit Court of Baltimore City.
The Circuit Court No. 2 of Baltimore City.³⁸

There are also five judges at large as a result of various legislative enactments who are assigned to the various courts by the Supreme Bench according to the demands of business in each.³⁹

The Supreme Bench is composed of one chief judge and ten associate judges, elected for fifteen years, receiving each a salary of \$6,875 and in addition such funds as may be specially allowed them by the Mayor and City Council of Baltimore up to \$1,625.⁴⁰ It is the duty of the Supreme Bench to provide for the holding of each of the above enumerated courts in Baltimore City by assigning one or more of their number to each of them. The judges so assigned may sit separately or together in the trial of cases in their respective courts. The assignment may, from time to time, be changed by the Supreme Bench as circumstances may require and the public interest may demand. In case of sickness, absence, or disability of any of the judges so assigned, adequate provision is to be made for the hearing of the cases or the transaction of the business assigned to the judge or judges so sick, absent or disabled, before some one or

³⁶ Acts 1927, Ch. 235.

³⁷ Maryland Constitution, Art. 4, Sec. 27 et seq.

³⁸ Enacted by Act 1888, Ch. 194.

³⁹ The Supreme Bench of Baltimore City consists at the present time of eleven judges who are assigned as follows: one to Circuit Court of Baltimore City and one to Circuit Court No. 2; two to the Superior Court, two to the Criminal Court; three to Baltimore City Court, one to the Court of Common Pleas, and one at large.

⁴⁰ Acts 1927, Ch. 235. Maryland Constitution, Art. 4, Sec. 31A.

more of the other judges. Finally, the judge or judges so assigned to the several courts shall, while holding the same, have all the powers and exercise all the jurisdiction belonging to such court.⁴¹

The Supreme Bench by the constitution of 1867 was given further power to hear and determine all motions for a new trial in cases tried in any of the courts of Baltimore City when such motions might arise, either on questions of fact or for misdirection upon any matters of law, and all motions in arrest of judgment or upon any matters of law determined by any of the judges while holding their several courts; from its decision upon any of them, an appeal was allowed to the Court of Appeals.⁴² The purpose of the framers of the Constitution was evidently to vest the Supreme Bench with appellate powers intermediate between the other courts established for Baltimore City and the Court of Appeals similar to those previously exercised by the Court of Appeals alone; and, moreover to refer to the judges sitting "in banc" the decisions of motions for new trial, motions in arrest of judgment and the like arising in the other courts, and "upon any matters of law" determined by any of the judges in their respective courts. At least, such was the interpretation of the Court of Appeals in the two cases of *Roth & Boyle v. The House of Refuge*.⁴³

It was found, however, that the practical operation of the jurisdiction thus conferred was not satisfactory. Unavoidable delays occurred. The volume of business in each of the courts became so great, and long sessions of the Supreme Bench in general term were so inconvenient that, in pursuance of the constitutional provision that "the General Assembly may reapportion, change, or enlarge the jurisdiction of the several courts of Baltimore City,"⁴⁴ an act was passed in 1870 providing:⁴⁵

⁴¹ Maryland Constitution, Art. 4, Sec. 32.

⁴² Maryland Constitution, Art. 4, Sec. 33.

⁴³ 31 Md. 329.

⁴⁴ Art. 4, Sec. 39.

⁴⁵ Acts of 1870, Ch. 177.

"The judge before whom any case may hereafter be tried in either the Baltimore City Court, the Superior Court of Baltimore City, or in the Court of Common Pleas, shall have *exclusive* jurisdiction to hear and determine, and the said judge shall hear and determine all motions for a new trial, when such motions arise either on questions of fact, or for misdirection upon any matters of law, and all motions in arrest of judgment or upon any matters of law determined by the said judge; and all such motions shall be heard and determined within thirty days after they are made."

This act takes away the former appellate jurisdiction of the Supreme Bench except as regards the Criminal Court and the Circuit Court, pertaining to which it remains as before.

The present jurisdiction of the Supreme Bench and the only occasions practically for its sitting are to hear motions for new trials and in arrest of judgment and the like arising in the Criminal Court, to handle the admission to the bar of applicants duly qualified, to hear charges of professional misconduct against members of the bar, to reapportion and to reassign the judges from time to time to the different courts in the city, to prescribe new or modify old rules of practice in the several courts, and to select members of the grand jury.

Unlike the counties where the Circuit Court is the sole repository of all equity, criminal, and civil common law jurisdiction, sitting now to handle one class of cases, now another, in Baltimore City, each court handles always the same class of business and only business of that class. Exclusive jurisdiction in all equity cases rests concurrently in the Circuit Court for Baltimore City and Circuit Court No. 2.⁴⁶ (not to be confused by reason of their inappropriate names with the Circuit Courts for the counties). The Criminal Court of Baltimore City has exclusive jurisdiction in all cases of felony and other crimes, offenses, and misdemeanors within the City of Baltimore⁴⁷ except in that class of cases where jurisdiction is vested in the Police Magi-

⁴⁶ Maryland Constitution, Art. 4, Sec. 29.

⁴⁷ Ibid., Sec. 30.

strates.⁴⁸ All other jurisdiction, i. e. original civil common-law cases, is vested concurrently in the Superior Court, the Court of Common Pleas, and the Baltimore City Court.

These so called common-law courts in addition to their concurrent jurisdiction over general common-law cases have certain fields of exclusive jurisdiction. The Baltimore City Court is alone empowered to hear appeals from justices of the peace and from the Street Commissioners of Baltimore City, and other cases arising under the ordinances of the Mayor and City Council of Baltimore.⁴⁹ The Court of Common Pleas has exclusive jurisdiction to hear applications for the benefit of the insolvent laws of Maryland.⁵⁰ The Superior Court is the court for the keeping of all the records of the transfer of real and personal property and probably has sole jurisdiction in cases of mechanics liens.⁵¹

Outside of these special fields, the three courts have concurrent jurisdiction and the only limit is that the amount recovered in contract cases must exceed the sum of \$100,⁵² while in tort the amount claimed must exceed \$100. Where the verdict of the jury or the amount recovered in an action for breach of contract is less than this minimum jurisdiction (less than one hundred dollars and one cent) no judgment for the plaintiff can be rendered, but a judgment of "non pros" must be entered. Formerly the effect of this was to leave the matter in dispute unsettled and open to further controversy⁵³ either in court or before a justice of the peace except that the plaintiff could not use as evidence the verdict given in his favor. Now, however, under later legislation, the plaintiff in such case is not at liberty to bring a second suit in any of said courts upon the same cause of action, but must sue before a justice of the peace, and upon producing before him a short copy of the

⁴⁸ See above, p. 13.

⁴⁹ *Page v. Mayor*, 34 Md. 563, Const. Art. 4, Sec. 28.

⁵⁰ *Van Nostrand v. Carr*, 30 Md. 128, Const. Art. 4, Sec. 28.

⁵¹ *Miller & Kaufman v. Barroll*, 14 Md. 173.

⁵² See above, p. 10.

⁵³ *Schindel v. Suman*, 13 Md. 310.

verdict and judgment of "non pros" is entitled by virtue thereof to a judgment for the amount of the verdict, less the costs adjudged against him.⁵⁴ When, however, a judgment by default is entered in favor of the plaintiff in an action for breach of contract, and the defendant later prays a jury trial by way of an inquisition to determine damages the result of which is less than \$100, a judgment may be entered in favor of the plaintiff for the amount of such inquisition.⁵⁵ The reason for this is that the judgment by default conclusively establishes the jurisdiction of the court.

For each of the courts of Baltimore City, except the Supreme Bench, there is a clerk elected by the qualified voters of the city for a term of six years, subject to removal for willful neglect of duty or other misdemeanor in office on conviction in a court of law.⁵⁶ In case of a vacancy, the Supreme Bench has power to appoint a clerk for the court in which the vacancy occurs to hold office until the next general election of delegates to the Legislature, when a clerk shall be elected to serve for six years thereafter.⁵⁷ The clerk of each court, as in the counties, may appoint, subject to confirmation of the judge or judges of his court, such deputy clerks to assist him as the judge or judges may deem necessary to perform the duties of the office.⁵⁸ These deputy clerks are removable by the judges for incompetence or neglect of duty.⁵⁹

In connection with this branch of the court system is associated the office of sheriff, which has been transmitted from common law times.⁶⁰ This officer, while charged with the

⁵⁴ Acts 1888, Ch. 360.

⁵⁵ *Cooper v. Roche*, 36 Md. 563.—It is interesting to note that the court here allowed a technical rule to overrule apparently a plain provision of the Constitution. They allowed a verdict by way of inquisition for an amount below the jurisdiction of the court as given by the constitution to stand when rendered after the defendant had suffered a judgment by default, giving the reason cited in the text.

⁵⁶ Maryland Constitution, Art. 4, Sec. 37.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, also Sec. 26.

⁵⁹ *Ibid.*

⁶⁰ See *Bouvier, Law Dictionary* under "Sheriff."

preservation of the peace in general and as such being sort of chief police official for the State in his county or city, is also the executive agent of the courts. It is in this latter connection that we are now interested in him.

The Constitution of Maryland provides for the popular election of a sheriff for each of the counties and the City of Baltimore, in the counties for a two-year term and in the city for four years.⁶¹ Each sheriff holds office until his successor is duly elected, qualified, and installed by having given proper bond. No person is eligible for election to the office until he is twenty-five years of age and has been a resident of the State of Maryland for six years preceding his election. In Baltimore County no person may hold the office for two successive terms. In case of a vacancy in the office the governor has power to appoint a person to it for the remainder of the term.

In modern times, the sheriff has come to be regarded more and more in his capacity as an agent of the court. He must attend each session of court in person or through his deputy for the maintenance of order or the taking of orders from the court.⁶² He carries into execution the various orders which the court makes in the disposition of cases and in addition executes the final judgment or decree of the court.⁶³ This includes, in civil cases, collecting the award and may include the seizure and sale of property in order to satisfy the judgment. In criminal cases the sheriff as keeper of the county jail has custody of the prisoners confined there and guards and delivers prisoners into court or other institutions under the court's orders.⁶⁴ He is further charged with the execution of criminals sentenced to death.⁶⁵ He is also charged with certain duties in drawing and summoning jurors, and when he can't act for some reason or other the

⁶¹ Art. 4, Sec. 44.

⁶² *Green v. State*, 122 Md. 291.

⁶³ Bagby's Code, 1924, Art. 87, Secs. 5-21. This means that the sheriff in person or by deputy serves all writs and orders, summonses and subpoenas, warrants of arrest and attachments.

⁶⁴ *Ibid.*, Secs. 44-46, 28.

⁶⁵ *Ibid.*, Sec. 27.

Constitution provides that an "elisor" may be appointed for that purpose.⁶⁶

There is another official that is hard to characterize as judicial or executive from the nature of his functions, namely, the coroner.⁶⁷ This official is appointed every two years by the governor, with the consent of the Senate, one for each county and one for each police district and one at large for Baltimore City.⁶⁸ One of the coroner's duties is to hold an inquest in all cases where it seems possible that death resulted in a way not clearly known to be accidental, or in the course of nature.⁶⁹ He is in such cases to summon a jury of twelve men, who investigate the cause of the death and from the evidence presented to them, and the more or less expert testimony of the physician, bring in a verdict and make accusations. The coroner conducts the whole inquest as a petty trial, summoning witnesses, swearing them, and gathering evidence. The verdict of the jury is written down and signed by the coroner and each of the jurors on a special printed form. It is customary in Baltimore City for the coroners to make reports of the various cases they investigate to the police department, and they are required by law to make monthly reports to the police commissioner of the cases coming under their jurisdiction.⁷⁰ Very often the coroner's inquest is the beginning of the State's action in tracing and punishing a certain crime.

In addition to the duty of handling all cases of violent or unnatural deaths, it is the coroner's duty to take the sheriff's place in all cases where for some reason the sheriff is incompetent or unable to act,⁷¹ as, for example, when the sheriff is

⁶⁶ Maryland Constitution, Art. 4, Sec. 45.

⁶⁷ Dr. David I. Macht in an article "The Ancient Office of Coroner" (Johns Hopkins Hospital Bulletin XXIV, No. 267, May, 1913) gives an interesting treatment of this office.

⁶⁸ Maryland Constitution, Art. 4, Sec. 45, Art. 15, Sec. 1; Public Local Laws of Maryland, Art. 4, Baltimore City, Sec. 294 et seq.

⁶⁹ Bagby's Code 1924, Art. 22, Secs. 1-3.

⁷⁰ Public Local Laws of Maryland, Art. 4, Baltimore City, Sec. 294 et seq.

⁷¹ Bagby's Code, Art. 22, Sec. 8.

interested, or nearly related to any of the parties, or otherwise disqualified.

This office of coroner is one of the oldest known to English law and was transmitted into practically all of the States of the United States. However, of recent years it has been the subject of much attack and perhaps not unjustifiably.⁷²

In addition to the courts and their officers described thus far, a special class of tribunals is established for the settlement of the estates of deceased persons, the appointment and supervision of administrators, guardians and similar agents of the law. Jurisdiction of such matters is vested in the various Orphans' Courts, of which there is one for each county and one for Baltimore City. The Constitution provides⁷³ that the qualified voters of Baltimore City, and of the several counties, shall elect three men to be judges of the Orphans' Courts of said city and counties, respectively, who shall be citizens of the State and residents for twelve months preceding in the city or county for which they may be elected. They are paid "per diem" for the time they are actually in session by the said city or counties, respectively, and hold office for four-year terms. In case of a vacancy the governor has power to appoint, subject to confirmation or rejection by the Senate, some suitable person to fill the office for the residue of the term.⁷⁴ Of the three judges elected for each county and the City of Baltimore the governor designates one to act as chief judge.⁷⁵ Any two of the judges shall constitute a quorum for business⁷⁶ and it is provided that the court shall be held in each county and the City of Baltimore on the second Tuesday in every month

⁷² A more detailed treatment of the problems surrounding the office of coroner will be given in the chapter, 'The Executive in the Administration of Justice.'

⁷³ Art. 4, Sec. 40; The Orphans' Courts of Maryland correspond to the "Surrogate Courts" in New York and the "Probate Courts" in certain of the New England States. In many states there are no courts with the special limited jurisdiction that is vested in this class of court.

⁷⁴ *Ibid.*

⁷⁵ Bagby's Code 1924, Art. 93, Sec. 240.

⁷⁶ *Ibid.*, Sec. 241.

of February, April, June, August, October, and December, and oftener if need be, according to its own adjournment.⁷⁷ Local laws provide for more frequent meetings in almost all the counties.

The Orphans' Court of each county and the City of Baltimore is presided over by a Register of Wills elected by the qualified voters for a term of six years.⁷⁸ In the main, his duties correspond to those of the clerk of a court of law or equity. He must make "full and fair entries" of the court's proceedings, and certify, under the court's seal, copies of the same or of proceedings in his office.⁷⁹ He is the custodian of the original papers in connection with the settlement of estates and the maker and custodian of the records of the same.⁸⁰ He makes out and issues process.⁸¹ He keeps all the records of the court and the various dockets.⁸² In addition to his other duties, he has certain judicial or quasi judicial functions. When the Orphans' Court is not in session, he may admit wills to probate, grant letters of administration and pass claims of not more than \$50 against estates.⁸³

⁷⁷ Ibid.—Various local laws in some counties have provided for more frequent regular meetings. Orphans' Court days throughout the state are now: Allegany County, every Tuesday and Friday; Anne Arundel, every Tuesday; Baltimore, every Tuesday, Wednesday, and Thursday; Calvert, second and fourth Tuesday of each month; Carroll, every Monday and Tuesday; Cecil, second Tuesday in each month; Charles, first and third Tuesdays in each month; Dorchester, every Tuesday; Frederick, every Monday, Tuesday, and Wednesday except during sittings of Court when it meets daily; Garrett, second and fourth Tuesdays in each month; Harford, every Tuesday; Howard, every Tuesday; Kent, every Tuesday; Montgomery, every Tuesday; Prince George's, first, second, and fourth Tuesdays in each month; Queen Anne's every Tuesday; St. Mary's second and fourth Tuesdays in each month; Somerset, second and fourth Tuesdays in February April, June, August, October, and December; Talbot, every Tuesday except election day; Washington, Tuesday and Friday in each week; Wicomico, second and fourth Tuesdays in each month; Worcester, second and fourth Tuesdays in each month. Maryland Manual, 1927.

⁷⁸ Maryland Constitution, Art. 4, Sec. 41.

⁷⁹ Bagby's Code 1924, Art. 93, Sec. 275.

⁸⁰ Ibid., Sec. 277.

⁸¹ Ibid., Sec. 275.

⁸² Ibid., Secs. 8, 76, 118, 275, 276; Art. 79, Sec. 1.

⁸³ Ibid., Art. 93, Secs. 280, 281. A very thorough treatment of this branch of the law in Maryland is Dr. Alfred Bagby's Maryland Law of Executors and Administrators.

It is well to note again that the Orphans' Courts are tribunals of especially limited jurisdiction, unknown to the common law, their functions and powers being prescribed entirely by the Legislature. The Court of Appeals of Maryland has, however, held that they do have a certain inherent jurisdiction by virtue of their being courts and arising out of the purpose for which they were formed.⁸⁴

From this description of the organization of the trial courts in Maryland one gets but a slight idea of the many problems that arise with regard to them. So numerous and involved are they and, in some cases, so little consideration do they receive from those who are actually involved in the process of the administration of justice that a separate chapter is given to their discussion.

⁸⁴ *Montgomery v. Williamson*, 37 Md. 421.—A sale reported by the executrices of an estate was ratified by the Orphans' Court through a material misapprehension. Some years later, the executrices petitioned to have the sale set aside claiming they had been misled by the representations of the purchaser at the time the sale was made. It was held that by virtue of its being a court, the Orphans' Court had the inherent power to take jurisdiction and correct action on its part erroneously taken or fraudulently procured.

CHAPTER III

TRIBUNALS OF INTERMEDIATE GRADE

Their Problems

In approaching this part of our work, the writer wishes to make it clear that the problems of the courts just described (in the previous chapter) are too numerous and involved to lend themselves to a complete detailed treatment in the space of a single chapter. Many are technical in their nature and would require for their comprehension such a complete grasp of the intricacies of the law that it is impracticable to discuss them where full explanation cannot be given. The most we can hope to do, therefore, is to deal with the most outstanding features of organization and procedure that meet the eye of the ordinary observer, and are under discussion more or less frequently by those who are interested in the prompt and efficient administration of justice, along with such minor subjects as are capable of a non-technical consideration.

As far as classification is possible, the problems divide themselves most naturally into questions of organization and questions of procedure. Problems of organization have two phases: the internal organization of the several operating units, and the determination of the relations that these operating units shall have with each other, or, stating the latter otherwise, the extent to which each unit shall constitute an independent or autonomous organism or shall be but a part or subdivision of a general grouping of all units. The relative simplicity of the problems involved along with the substantial uniformity existing in respect to the internal organization of courts makes it necessary to devote only a few words to this division.

All courts of record, such as the general trial courts are, embrace three subdivisions or offices that may be clearly dis-

tinguished: Office of Judge, Office of Clerk, and Office of Sheriff (or Marshall, as in the Federal system).

The judge's office, of course, comes first and is of most importance, as the office of general administration of the court. The incumbent of the office presides over all proceedings, exercises general authority over the other officers of the court, and renders the decision in all matters coming before the court for consideration. The office, as such, may be held by a single judge or by a panel of judges. An analysis of the situation in Maryland will show that for some purposes it is a single judge, while for others it is a panel of judges. For the purposes of the control of its sessions, the assigning of a judge to it and general matters of administration, any Circuit Court of a county in Maryland is under the control of the panel of judges elected for the circuit in which the county is located. Similarly, in Baltimore City, each court is under the supervision of the Supreme Bench. On the other hand, in the trial of any particular case, the court consists of a single judge who conducts the trial and gives judgment except in grave criminal cases, when two or more judges are usually assigned.

In the equity courts, provision is made for the judge to appoint a class of assistants known as auditors¹ and examiners in chancery.² The use of the auditor is especially valuable in cases involving the examination of complicated accounting transactions. The function of the examiner, when he is used, is to take the testimony of the witnesses outside of the court and report it to the court for use in the conduct of the trial. In Maryland, the court may upon application of the party in interest order the testimony to be taken in court as in a civil common law trial instead of having it taken before an examiner.³

In this connection mention may well be made of the distinguishing characteristic of the English judicial system, the office of Master. The Masters are permanent officers of the

¹ Bagby's Code, Art. 16, Sec. 19.

² Ibid., Sec. 269 et seq.

³ Ibid., Sec. 278 et seq.

English courts who conduct a preliminary examination of all cases brought before the court, in law as well as equity, for the purpose of determining the exact issues involved, of attending to all preliminary matters in the way of securing discovery of and presentation of all material facts, and, if possible, of bringing about a settlement of the issues without having the case formally tried in open court. This relieves the court of the consideration of many cases altogether and economizes the court's time in the handling of those that are tried. Undoubtedly there is room for the work of a similar officer in connection with the judges of our courts.⁴

In discussing the office of judge, it is appropriate to give some consideration to the manner in which it is filled. As already seen, the judges are popularly elected in Maryland for a term of fifteen years, subject to removal from office by the governor on conviction in a court of law of incompetency, of willful neglect of duty, misbehavior in office, or any other crime; or on impeachment; or on the address of the General Assembly, two-thirds of each house concurring in such address, the accused having been notified of the charges against him and having had opportunity for making his defense.⁵ It is interesting to study this mode of filling the office in the light of the established tradition that the judiciary shall be free and independent.

That this is the proper measure of the judge's position should be uncontroverted. The whole constitutional history of modern England has as one of its dominant features the establishment of the judiciary as the protector of the liberties of the people against the tyranny of the king and his agents. Out of this arose the principle that the judiciary should be free from the control of the other branches of government in a position where they could weigh any action against established principles of law without fear. Then, that the judi-

⁴ For a discussion of how practice is facilitated by the employment of masters, see an article, "Certain Features of English Procedure," by Robert G. Dodge, in the *Journal of the American Judicature Society* for April 1926.

⁵ Maryland Constitution, Art. 4, Secs. 3, 4. See above, p. 44.

ciary might be competent to protect each individual's rights against anothers, the principle has become just as firmly imbedded that it shall be as independent as possible of all personal or private influence, such as financial, religious, racial, and other social or political pressure. These principles are recognized as fundamental to our system of jurisprudence and they find concrete expression in the Declaration of Rights of the Maryland Constitution in the words: "That the independency and uprightness of Judges are essential to the impartial administration of Justice, . . ." ⁶

This independency and uprightness is secured in several ways. First is the adoption of the principle that no civil liability attaches to the judge in the performance of his duties, no matter how gross may be his misconduct in the process of a trial.⁷ This is a well recognized principle of law throughout English and American courts.⁸ Some people criticize it as going too far and state that the judge might well be held liable for deliberate fraud or misconduct as well as other errors of conduct of a lesser grade without prejudice to his position of independence. In European countries, where there is equal adherence to the principle of an independent judiciary, there is no such broad immunity granted as by our law and it may be that we have gone too far. However, if we are to retrace our steps, we must have care not to go to the extent where the above principle of freedom of action without fear will be impaired.

A second guarantee of independence is in the provision that no judge's salary may be withheld or diminished during his term of office.⁹ This, also, is a common constitutional provision throughout the States of the United States and is secured in England by the device that the compensation of judges constitutes a permanent charge upon its consolidated fund and does not therefore have to be included in annual appropriation bills.

⁶ Art. 33.

⁷ *Roth v. Shupp*, 94 Md. 55.

⁸ 33 *Corpus Juris* 981.

⁹ Maryland Constitution, Art. 4, Secs. 24, 31.

A third device, and perhaps the most essential one for securing the independence of the judiciary, is that the judges should not be subject to arbitrary dismissal. The constitutional provision quoted above¹⁰ shows that the judges in Maryland are subject to removal only upon proper conviction in a court of law of certain offences, upon impeachment, or upon address of both houses of the Legislature. While this insures the judges against arbitrary removal, it provides adequate means for getting out of office undesirable men, whether because of their misconduct or because of inability to perform the office because of some affliction that may fall on them. In the latter instance, it was found difficult to remove a judge where the only means provided for was impeachment, as in the federal system.

While these three outstanding safeguards are the mainstays of an independent judiciary, many students of the subject and an authority such as Mr. W. F. Willoughby consider it highly desirable to have other provisions to strengthen the principle in operation. These consist of the fixing of the term of office for life or during good behavior rather than during a term of years and the adoption of the method of selection through appointment rather than by popular vote. Where the office is only held for a term of years and there is popular election, as in Maryland, there is the objection that partisan political considerations may enter and the judge may be influenced by the desirability of making his actions conform to the wishes of those to whom he owes his office. The long term of office, fifteen years, provided for in Maryland does much to eliminate this possibility, and the writer might say that it is his opinion that the morale of the judiciary has been too high to be affected by such consideration.¹¹

It is unfortunate to note, however, that the morale of prac-

¹⁰ See above, p. 55.

¹¹ The governor's power (Constitution, Art. 4, Sec. 5), in the case of a vacancy, to appoint a judge to hold office until the next regular election for the general assembly when the office is filled by election, and the tendency to elect such appointees back to office has given in practice what amounts to appointment of judges in Maryland.

tical politicians is a different matter. In the last election of Baltimore City judges, when a Republican judge had to stand for reelection, it may or may not be significant that he was replaced by a Democratic candidate along with four other Democratic judges running for election.

Maryland is not without company in providing for the popular election of judges. Approximately three-fourths of the States of the United States select their judges by this method and for a term of years.¹² This is a change from the early system in the States, but once it was begun by New York in 1846 it has received wide popular favor and has been encouraged by politicians everywhere.

Other methods of selection of judges are: election by the Legislature, appointment by the chief executive and appointment by the chief justice of the Supreme Court as head of the judicial branch (when the system is more or less unified).

The last two are probably the most desirable, as far as securing freedom of the judges is concerned. The fundamental argument in favor of election by the people is that in a popular government resting upon the principle of the separation of powers those in control of each of the three branches of government should derive their offices from and be responsible directly to the people. This is not absolutely valid, for the principle of independence is that the judiciary shall be responsible to no man but be free to apply the law as interpreted in the light of clear logic and reason. For example, if the judges declare social legislation unconstitutional, is it not better to have the people remedy this by passing an amendment to the Constitution than it is to let them elect different judges? That independence is best secured by appointment is undoubted where the appointing power has no control over removal afterwards. Also, appoint-

¹² This is based on Mr. W. F. Willoughby's manuscript on judicial administration. In 1917, the manner of selecting judges in the various states was through appointment by the governor in Delaware, Mississippi, Massachusetts, New Jersey, and New Hampshire; appointment by the legislature in Connecticut, Rhode Island, South Carolina, Vermont, and Virginia; and by a mixed method in Florida and Indiana. All other states had the method of popular election.

ment of the judges by a popularly elected Chief Judge at the head of the system would answer both the argument for popular election and that for complete independence of the judges.

That the people are far from being ready for such a radical step as the last plan, desirable as it might be, is undoubted, and we therefore might as well face the situation as we have it. The chief suggestion that the writer can make is that the Bar be raised to the point where it can control the nomination of the candidates for judges. This would put popular election on a higher plane and assure the selection of men with proper qualifications for the office, which qualifications can hardly be consistently secured by a direct popular choice.

The same popular choice as for judges in Maryland exists as regards the clerk of each court. The clerk's office attends to all matters having to do with the issuing and return of summons, the receipt and filing of declarations or bills of complaint, answers and other documents, the making of a proper record of all such transactions, the preparation of the docket, etc. The office is, in short, the administrative center of the court and quite a few deputy clerks are employed throughout the State to assist in keeping the business of the courts in running order. Since the efficiency of the court depends to some extent on the proper care of the clerk's duties, it is proper that he should be under the control of the judge. Although this is more or less possible, because of the power of having the clerk dismissed upon proper charges heard by a court of law and sustained, it is nevertheless true that his popular election puts him to a certain extent in an independent position. We feel that the clerk might well be appointed by the judge of the court in which he serves, thereby centralizing complete responsibility in the head of the court.

The other main officer of the court, or sheriff, presents one of the most interesting anomalies of the law. We have noted his duties in the prior chapter. That he may perform them,

he has power, when properly authorized, to make arrests, seize and dispose of property for the settlement of judgments, and in case of resistance to swear in deputy sheriffs or to summon a posse comitatus. As executive officer of the court he has under his direction and control the bailiffs whose duty it is to maintain order in the court.

Theoretically, the sheriff should be exclusively an officer of the court and subject to no other authority. Actually, he holds, as we have seen, two offices, that of executive officer of the court and that of chief peace officer of the county. The office's interesting history goes back to early Anglo-Saxon days in England. Undoubtedly the sheriff's chief duties were as chief peace officer and as part of the administrative branch; today these duties are practically negligible when compared with the work that he does for the courts, especially in urban areas. It is an interesting instance of how the courts have appropriated an executive officer to their own use, making him completely subject to their orders and responsible to them when acting as their officer. Though the situation may seem illogical, it works with satisfaction and there is small probability of change in the immediate future.

Looking now to the external relationships of the courts to one another we have several interesting problems to face, the division of law and equity, criminal and civil cases, and the general scheme of organization throughout the State.

Probably one of the most interesting developments of the Anglo-American legal system is that of a dual system of law and equity and the subsequent reunification in many jurisdictions. The history of this development is so commonly known that it is useless to repeat it here, except by way of short summary to preface our discussion. Suffice it to say that because of the limited jurisdiction of the common law courts as established in early England, whose machinery could only be started by the use of writs issued in the name of the king, rigid and technical in form, and restricted in use to cases that fell clearly within their terms; the inflexibility of the common law rules as developed by the early

judges; and the length and cost of litigation as generally conducted, many people began to appeal to the crown to redress their grievances that the courts could not or would not hear. These petitions became so numerous that they were turned over to the chancellor (as the most fitted assistant of the king, the fountain of all justice). At first equity petitions were heard as a matter of grace. Then as early as the year 1280, in the reign of Edward I, an ordinance was passed giving the chancellor power to hear these petitions in the first instance as a matter of law. And finally, by the time of Henry II, the work performed by the chancellor had increased so much in volume and importance that a permanent Court of Chancery was established, with its own jurisdiction and special mode of procedure. The early struggles between this court and the common law courts, with the final triumph of chancery in the exercise of its powers to restrain the enforcement of judgments obtained in an unconscionable manner, present an interesting page in the history of England.

This dual system became firmly embedded in English law and was transferred to the American colonies and became a part of the system in practically all of the States as they established governments of their own. And now, long after England has abolished the procedural distinction, many of our States retain it. Their systems may be grouped generally into three classes.¹³ In the first class equity is administered by courts separate and distinct from the common law courts, and the procedure is based upon that of the English High Court of Chancery.¹⁴ In the second class, to which Maryland belongs, are found those States where equity is administered by the judges of the common law courts, but the procedure is kept distinct and is generally the same as that used by the States in the first class.¹⁵ The third class

¹³ Sec. 21, *Corpus Juris* 24.

¹⁴ In this class are: Alabama, Arkansas, Delaware, Mississippi, New Jersey, Tennessee, and Vermont. Clarence N. Callender, *American Courts, Their Organization and Procedure*, 136.

¹⁵ In addition to Maryland this class includes: Florida, Illinois,

includes all the other States where the distinction between law and equity has been abolished. In these States, however, many equitable remedies are provided for by statutory forms of action, which accomplish the purpose of preserving in substance what in form has been abolished.

Maryland has been classified in the second group mentioned above, for that covers the general system throughout the counties where the distinction exists as to procedure but not as to separate tribunals, as may be seen from our discussion in the prior chapter. However, it is to be noted that Baltimore City might more properly be placed in the first class, for there the distinction still prevails to the extent of having separate tribunals sitting always as equity courts and before which all equity actions must be brought.

Many justify this situation on the ground that the remedies of the equity courts are necessary and since they give these remedies we must keep them. These men fail to consider that the same substantive rights could be maintained with a much less complicated system and with far less expense. Mr. W. F. Willoughby most thoroughly sums up the situation and remedy as follows: ¹⁶

. . . Probably the greatest objection to this system is the added complexity that it gives to the whole system of the administration of the law. There can be no question that, in its practical operation, the existence of two sets of rules, two classes of remedies, and two courts is productive of trouble, delay, and expense. Cases frequently arise where it is difficult even for the experienced lawyers to determine whether resort should be had to a court of law or a court of equity for relief. At times the action is brought in one court only to have it thrown out after trial by a superior court on the ground that it should have been brought in the other. In such cases the whole proceeding has to be begun *de novo*. In other cases the entire relief required by the circumstances cannot be given by either court and two actions have to be prosecuted, one in the court of equity and one in a court of law. There are even cases when a court of equity is appealed to restrain action in a court of law. Such a system, as Judge Baldwin says,¹⁷ is intrinsically absurd and is only tolerated because the lawyers and the community have become accustomed to it.

It has been pointed out that this anomalous condition of affairs

Maine, Massachusetts, Michigan, New Hampshire, Oregon, Rhode Island, Pennsylvania, Virginia, and West Virginia.

¹⁶ Manuscript of lectures on judicial administration.

¹⁷ Simon E. Baldwin, *The American Judiciary*, 133.

is due wholly to historical accident, the circumstances under which the system of judicial administration developed in England. No country other than England and those which have derived their legal institutions from that country has any such duality in its laws and methods of their administration. It is evident, therefore, that it does not rest upon any essential need. No country starting with a clean slate with full powers of choice would for a moment think of bringing into existence any such system. The United States is thus confronted with the concrete problem as to whether having this system it is necessary to continue it with all its disadvantages, and if not, just what should be done towards its abolition or modification so as to reduce to a minimum its evils.

In considering this problem it is necessary to distinguish between the two bodies of substantive law known as common law and equity, the two sets of tribunals through which this law is administered, the two forms of procedure employed by these two tribunals and the two classes of remedies that they have the power to provide.

Any attempt to abolish the distinction between law and equity as bodies of substantive law is probably futile until that time, far distant if it ever comes, when a complete codification of substantive civil law is entered upon. Nor, in fact, is there any need for such a consolidation. The two bodies of law do not so much conflict with as supplement each other. Conflict and unnecessary complexity exist only in respect to the other features. What is really required is a single set of courts with jurisdiction in respect to both classes of law with power to grant any relief that can be granted by either courts of law or equity as they now exist and to make use of the procedure employed in either according as the needs of each case to be adjudicated render desirable. To state this in another way, what is both desirable and feasible is unification merely from the administrative standpoint.

In England the work of fusion from the administrative standpoint is practically complete, and many American States have gone far along the same lines. Maryland, however, lags behind with many other jurisdictions in the failure to abolish the needless distinction in the two forms of procedure.

Before leaving this subject, one attempted reform in Maryland is worthy of note. Following the reform introduced in England by the Common Law Procedure Act of 1854, the Act of 1888¹⁸ in Maryland introduced the use of equitable pleas in bar in suits at law. The function of such a plea is to enable the defendant in a law action, if he has such a defense (not formerly recognized at law) as would enable him to obtain relief in equity against the judgment, that would be rendered in such law action, to plead such defense in the

¹⁸ Acts 1888, Ch. 574, Bagby's Code 1924, Art. 75, Secs. 91-93.

law action by way of an "equitable plea in bar." The Act provides for a replication on equitable grounds to such plea if the plaintiff has such an equitable replication. The Act has been held to deprive the defendant of any rights he formerly had in equity should he fail to make such plea,¹⁹ if such a plea could have been filed with beneficial results.²⁰ From the state of the law on this subject it can be fairly said that this attempted relief has done little more than add fresh complication to the already too complicated system.

Along with the dual system of law and equity may be treated the dual function of handling civil and criminal cases. Here the question arises, however, as to the desirability of making the functions more distinct. In Maryland, the county judges handle first the civil and then the criminal side of the docket, each judge getting a certain amount of each kind of work. The same result comes in Baltimore City, although less frequently because of the principle of rotating the judges from one court to another. As said before, the question arises as to whether or not it would be more desirable to have a specialization by the judges on one class or the other, because the nature of the problems involved is so different as to require an entirely separate kind of treatment.

It may be said in opposition to such a division of functions that usually it might require two judges where the volume of business is not large enough to occupy the time of one. This might be remedied if the system in the State were completely unified so that the judges would be part of one court for the whole State and assigned as that court might direct rather than limited to a particular circuit. Even then it is fair to say that the judges might desire to rotate as to the various

¹⁹ *Park Association v. Shartzter*, 83 Md. 13; *Shartzter v. Park Association*, 86 Md. 337.

²⁰ This must be added, for in *Stump v. Warfield*, 104 Md. 552, it was held that a defendant in ejectment is not always precluded from going into equity after judgment because he did not interpose a plea by way of equitable defense for sometimes it is almost impossible to properly set up a claim by plea on equitable grounds so as to do justice between the parties.

kinds of business, since it is usually the opinion of judges, where a system such as we have in Baltimore City exists, that the principle of rotation works best or at least suits the wishes of the judges best. On the other hand, it is the opinion of Mr. W. F. Willoughby,²¹ after a careful study of the situation, that a separate court for each class of cases presided over by separate judges without provision for rotation gives the best results if it can be had without the creation of unnecessary tribunals. We are inclined to agree that a complete distinction between the two classes of work is the more desirable plan.

The remaining question that we may profitably consider under the head of organization is that of the relation of the courts to one another as part of a system. The situation in Maryland is, as may be seen from the prior chapter, one of almost complete decentralization. Each circuit constitutes a more or less autonomous unit and handles its business without regard for what the others may be doing. In so far as the volume of business in the various circuits is fairly equal, this is all right, but in so far as it is not there may be a crowded docket in one quarter of the State, with judges in several other quarters with no work to do. That this could be remedied by completely unifying the system throughout the counties into one court under the control of a presiding judge with an appeal division and a division of general trial jurisdiction is the writer's opinion. The judges in the appeal division would be kept entirely to handle appeals; the judges in the general trial division would be apportioned by the presiding judge to hold courts in each county of the State as the volume of business might demand, and the whole system kept under the administrative direction and control of such presiding judge, who might well be assisted by an advisory council. Baltimore City, of course, would create a special problem, but it could well be handled by having for it a special bench of judges from the general trial division, supervised by a chief judge for Baltimore City, in whom

²¹ Manuscript, Lectures on Judicial Administration.

would be vested the present powers of the Supreme Bench of Baltimore City in so far as they control the administration of the courts. That, briefly, would give an administratively centralized system of courts and would undoubtedly provide for a more efficient and less expensive control of the situation. Congestion would be relieved in quarters merely by using judges not needed in the courts where there is less business.²²

That such a sweeping change is likely is to be doubted and we can but appraise the merits of the present system. With the Supreme Bench acting as a body of supervision and control in Baltimore City, certain of the advantages of unification are had without the form thereof. The extra judges can be more or less freely apportioned between the various courts according to the demands of business, and within the limits of its powers the Supreme Bench may make rules to expedite the dispatch thereof in any way. In the counties, each circuit being under the control of the judges of that circuit, they may likewise apportion their time among the counties as the demand of business requires.

A word of appraisal may well be said of the Orphans' Courts, the tribunals especially established to handle the estate of deceased persons. They perform their work effectively and the giving of such business into their hands alone is undoubtedly justified. The work is administrative in nature and needs the prompt treatment that can be most efficiently given by a body especially established for that purpose. The only suggestion that might be made is that such specialized bodies could be just as efficiently established as a branch of a unified system and under the control of the head of such a system.

Let us turn now to a consideration of the problems arising with regard to the procedure of the courts. The discussion will necessarily center around the rules governing such procedure and practice of the courts and their application. These rules are admittedly complicated, and technical

²² For a more complete study of the unified court system see the last chapter of this work, General Judicial Reform.

in the extreme; so much so that, not only is it impossible for the general public to understand them, but very often after long study and experience, judges and lawyers find it difficult to understand them or at least to apply them to specific cases with certainty. This situation is highly undesirable and is in more need of attention than any other single feature of our judicial system in Maryland, or for a matter of fact in most of the other States of the Union.

Problems arise generally as to the source of the rules and as to their nature as dealing with the preparation of the case, the trial, and appeals. As to the authority to prescribe the rules, the question arises as to whether it should be the legislature, the courts themselves, the constitution, or partially one and partially another. A glance at our system will show that the courts are bound in their actions by rules prescribed by outside authority more so than any other branch of government, and unfortunately so.

In the first place the Constitution of Maryland, like the federal Constitution and many of the other state constitutions lays down many provisions binding the courts in their actions as follows:²³

1. Art. 5. "That the inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity. . . .

2. Art. 8. "That the Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said departments shall assume or discharge the duties of any other.

3. Art. 19. "That every man for any injury done to him

²³ See Declaration of Rights; sections as enumerated in quotations.

in his person or property ought to have remedy by the course of the law of the Land and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

4. Art. 20. "That the trial of facts, where they arise, is one of the greatest securities of the lives, liberties, and estate of the People.

5. Art. 21. "That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the indictment, or Charge, in due time (if required) to prepare for his defense; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

6. Art. 22. "That no man ought to be compelled to give evidence against himself in a criminal case.

7. Art. 23. "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any other manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the Law of the Land.

8. Art. 25. "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted by the Courts of Law.

9. Art. 26. "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

10. Art. 40. "That the liberty of the press ought to be inviolably preserved; that every citizen of the state ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.

11. Art. 15, "Sec. 5.²⁴ In the trial of all criminal cases, the jury shall be the Judges of the Law as well as of fact.

12. Sec. 6. "The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five dollars, shall be inviolably preserved."

It is not our purpose to examine in detail these constitutional limitations except as they arise with regard to the specific questions that we must discuss, but we wish to point out their existence and observe their bearing on the movement for any judicial reform. Undoubtedly, existing as constitutional provisions, they present greater obstacles in the path of reform than they would otherwise. To make the situation more difficult the legislature has sought to prescribe in great detail the precise procedure to be employed by the courts in all of their actions. The administrative and legislative branches of the government have been left practically free in determining their own actions as far as the prescribing of such rules is concerned. There is some question if the same freedom might well be given to the courts.

That the limitations imposed by the Maryland Declaration of Rights are those to be commonly found throughout the United States is unquestioned, and that they were clearly justifiable when they originated may also be admitted. But, there is considerable question whether the justification for certain of these provisions has not passed away. This being true, there is the objection to such rules existing as constitutional provisions because of the difficulty of changing them.

There are many arguments for having the power to determine their own rules of procedure in the courts themselves. First, the courts because of their intimate knowledge of the work they have to do should be the most competent judges of the means to be employed. Secondly, as new needs arise and experience is gained the rules as originally framed may be modified from time to time with greater care by the courts

²⁴ Maryland Constitution proper.

than by any other body. Thirdly, there comes the greater flexibility in the application of the rules to the particular cases, and the possibility of subordinating the controlling force of such rules to the substantive rights or interests involved. Fourthly, the placing of the powers in the courts relieves an already over-burdened legislature of a duty which it is hardly competent to perform.

The first two and last of these arguments are self-explanatory. A word of explanation may be given to the third which is considered one of the most important grounds for allowing the courts to prescribe the rules of judicial procedure. Such court-made rules, instead of having the force of statutory law, the rigid observance of which is mandatory upon the courts and any failure in respect to such rigid observance lays the basis for an invalidation of the proceedings, would merely have the force of rules of procedure which might be varied to meet the substantive justice of a particular situation. The Journal of the American Judicature Society says that the fixing of rules of procedure by legislative enactment, "exalts mere procedural rules to the realm of substantive rights thus multiplying the number of issues to be tried and making our litigation more and more an inquisition into non-essentials."²⁵

Mr. W. F. Willoughby sums up his views thus:²⁶

It is difficult to exaggerate the evils flowing from this. More than anything else it is responsible for the prevalence of appeals from trial courts to courts of review, with the consequent added delay and expense in reaching a final decision, and to the practical denial of justice in many cases due to the fact that such decision rests so often upon the mere technicalities of procedure employed rather than the substantive rights involved. Furthermore, this condition of affairs tends to distort the whole judicial proceeding into one of a battle of wits and skill on the part of the attorneys for the parties in respect to the rules of the contest rather than one having for its single aim to determine the material issue. In this contest it may almost be said that it is the judge rather than the defendant that is on trial since it is upon the character of the action taken by him in applying the rules that the decision so often turns.

²⁵ Issue of June, 1917, I, 17, No. 1.

²⁶ Lectures on Judicial Administration. Manuscript.

In connection with the argument of relieving the legislature of a burden that another body could well perform, a study of the history of legislative bodies will show that we may say as a general rule that they should not attempt to do anything that can be equally well done by another body.

In summarizing our discussion of this topic, we may say, then, that we think it highly desirable that the courts should be allowed to work out the details of the procedure to be employed in their work. This does not necessarily mean that the determining of the whole nature of the procedure should be left to the courts, but that they should be left, as said above, to work out the details under a general principle prescribed by the legislature. This is the theory propounded by the American Judicature Society, the American Bar Association, and most of the students of judicial reform in the country, and comes under the name of "Short Practice Acts."

A "Short Practice Act" should contain provisions of a general character laying down the principles of procedure and grant the authority to the courts to adopt rules as in their judgment are wise. The schedule of rules of the British Judicature Act of 1873 is a model for such a Short Practice Act. The Journal of the American Judicature Society has to say in regard to this:²⁷

This schedule corresponds with what we now call in the United States a "Short Practice Act" but with this distinction, that it was subject to alteration by the Supreme Court of Judicature. It represented, however, what the most eminent workers in the field of judicial reform in their day considered appropriate for a foundation of practice and procedure. In this comparatively brief schedule of rules Parliament wrote a guaranty of liberal procedure and then left it to the rule-making power conferred in the Judicature Act for the development of the numerous detailed orders and rules necessary for the application of the principles laid down in this schedule.

In the same copy of the Journal, there is a short procedural act which is a model act for the giving of the rule making power to the courts.²⁸

The 1927 session of the Maryland legislature in facing the

²⁷ Issue of December 1920, IV, 115, No. 4.

²⁸ Published now in draft form as Bulletin 14.

problems did not follow any such tentative plan, but rather in a law submitted the whole power to make rules for proceedings in civil cases to the Court of Appeals. The law ²⁹ gives this court authority to prescribe by general rules for the courts of the state the forms of process, writs, pleadings, and motions, and the practice and procedure in actions at law, and to provide when such rules shall take effect. This act, although it applies only to civil cases, is an innovation in Maryland and represents an advanced step if the Court of Appeals takes advantage of its provisions and the legislature does not nullify the work by subsequent legislation.

Of course, it is too early to tell what will be the effect of the Maryland Act or the provisions made under it. However, we feel that there is no reason why the Court of Appeals, for the arguments assigned earlier in this chapter, should not be competent to take complete charge of the whole situation, prescribing the general plan as well as the details that can properly be worked out from the center and leaving for each court the problems that it can best prescribe the rules for. With the possibility of assistance by the Judicial Council of Maryland, the Court of Appeals should be able to provide for a very satisfactory reform.³⁰

One of the first points of attack in remedying the procedure of our trials might well be on the pleadings that are necessary to bring the parties to an issue. From early common law days, actions could only be brought by following certain specified forms and this introduced the first complication of procedure. Prior to 1918 in Maryland, there were some eight forms of action which were open to choice by a party in bringing suit and a wrong choice meant the failure of the cause. These actions were: three in contract, assumpsit, debt, and covenant; and five in tort, detinue, replevin, trover, trespass, and case (trespass on the case). In 1928 the legislature consolidated the contract actions

²⁹ Act 1927, Ch. 684.

³⁰ See below, Chapter on General Judicial Reform.

into one form, *assumpsit*,³¹ but this still leaves six actions to choose between in bringing a suit in addition to the choice between law and equity. This is a complication of form that is entirely unnecessary.

Even after the proper form of action was obtained, there were further complications of pleading to go through before the case was presented before the court. The pleadings developed at common law became very technical and, following this, needless formalism was built up here also, any violation of which resulted in throwing the party making such mistake out of court. Substance was obscured many times by matters of form. It was not unusual, and it is still possible, for the pleadings to go through many stages, of which the following is a hypothetical example:

1. Plaintiff's declaration: P complains of D in debt on a bond.
2. Defendant's plea: D confesses bond, but claims a release by P.
3. P's replication: P confesses release, but claims that the release was delivered to X as an escrow on the condition that D obtain release to P from P's bond to A.
4. D's rejoinder: D. confesses escrow, but says he did get A's release to P.
5. P's surrejoinder: P. confesses A's release, but says that A, at the time the release was signed, was a "feme covert."
6. D's rebutter: D confesses coverture of A, but says that her husband joined in the release.
7. P's surrebutter: P denies that A's husband joined in the release.

This illustration shows the steps that the pleadings might take with the names that have been assigned to them. If necessary, and instances of it are known, the pleadings might

³¹ Acts 1918, Ch. 392.

go on further until the parties come to an issue. Of course, they took on more complicated form than that given in the illustration and in many instances, as said above, a failure of form meant the loss of the case. Much time could be wasted by a lawyer who was a skilled pleader and also the opposing side might very easily be caught in an error of pleading if the lawyer on that side was not equally skillful. The writer remembers very vividly the story told in the Maryland law school of the most skillful Maryland pleader who could plead so well that it took his opponent several weeks, sometimes months, to return an answer. The same pleader handled his pleading so well in one case where he was counsel for the defense that it took the opposing counsel two years to arrive at an issue, by which time a mistake was made in the pleadings and when a new suit was brought the statute of limitations had run. A system which permits of that is indeed in need of repair.

Again it may be said of the Maryland system that much has been done to eliminate the above defects, to cause the parties to be speedily brought to trial on matters of substance. The greatest reforms are those made by the Act of 1856³² with its amendments of 1870³³ and 1872³⁴ the effect of which is to say that no declaration which states a sufficient cause of action in substance, nor a plea which states a sufficient defense, nor any subsequent pleading shall be held bad on a mere matter of form. The effect of this is to abolish the old special forms of opening and conclusions for pleadings that have been carried on from early days of the common law and to make substance the measure of sufficiency. The act also abolishes the special demurrer (going only to the form), and makes it possible for a party to demur only generally to the insufficiency of the whole statement of facts of the other party. A second great liberal reform is found in the provision allowing the parties to a cause to amend prac-

³² Bagby's Code 1924, Art. 75, Secs. 2, 3 et seq.

³³ Ibid.

³⁴ Ibid.

tically any part of their pleadings at any time before the jury retires to make up their verdict, in cases of jury trial; and in cases of trial by the judge without a jury or in cases of demurrer, at any time before judgment is entered.³⁵ This provision alone goes far towards preventing parties from forfeiting the justice of their case because of some mistake of pleading. And lastly, the provisions of the acts of 1888³⁶ and 1914³⁷ keep the parties from raising at the trial of the case by means of prayers or instructions, any questions as to the sufficiency of the pleadings that might have been raised on demurrer and prohibit the arresting or setting aside of any judgment for any matter or cause which might have been the subject of a general demurrer to the declaration or other pleading.

Although these provisions represent a vast improvement over the state of affairs previously existing, they still leave the many forms of action and the possibility for carrying the pleadings to an extended length. Reforms that the writer would endorse and which have been sanctioned by the American Bar Association, the American Judicature Society, and students of the subject generally, would be the revising of the system of preparing the case so that there would be a single form of action for all suits, a simplified pleading requiring the plaintiff to submit all the facts on which he bases complaint in one statement and the defendant to do likewise for his defense, the abolishing of the demurrer as a form of pleading, and perhaps a distinct separation of this part of the trial from the trial proper.

Modern opinion has become general that the single form of action should be a fundamental characteristic of a reformed procedure. By it a vast mass of legal technicalities would be abolished, simplicity would replace complexity, and justice would be more speedily obtained without wading through the

³⁵ Bagby's Code 1924, Art. 75, Secs. 39-49; Art. 9, Sec. 28; Art. 26, Sec. 44; Art. 86, Sec. 25; Art. 5, Secs. 18-20.

³⁶ *Ibid.*, Art. 75, Sec. 11.

³⁷ *Ibid.*, Art. 75, Sec. 97.

maze of technicalities necessary to the institution of a suit under our present system. The New York Code of civil procedure in 1849 adopted this reform and many other States have followed the example.

A simplified pleading would require that there be only two stages, the opening of the suit by a complete statement of all the facts of the situation on which the plaintiff bases his right to recovery and a single reply by the defendant of all matter that he has by way of defense. This is a logical consequence of the adoption of the single form of action for all suits and it would eliminate the complications and delay brought about by the extended course of the pleadings as they are now used. That the system works and gives good results in practice may be taken from the experience of England, where the system prevails.

The abolishing of the demurrer altogether is included as a reform along with that of simplified pleading. It is conceded that the demurrer is an efficient and rapid way of bringing proceedings to an end where there is a good defense at law without bringing the case to a trial on the facts. However, it may also be availed of as an instrument of delay (although the liberal amending provisions mentioned above remedy this abuse to a considerable extent). We feel the same good results without the bad may be obtained by having the defendant state his defense, whether in law or in fact, in a single answer and having the judge consider the defense in law first, upon the sufficiency of which he might terminate the case or determine to go to a trial upon the facts.

The last of the four reforms suggested depends on the distinct and separate natures of the two functions that the courts must play in the decision of a case, which a clear analysis of the situation will reveal. First is the supervision of the preparation of the case to be adjudicated; or having the parties state their respective claims, reveal the nature of the evidence that they intend to use to support such claims, and the developing of the complete factual background for the decision. Second is the making of such de-

cision or more specifically the considering and passing judgment on the issues so involved. Because of this apparent distinction, the expense necessary to the procuring of able judges to try cases, and the difficulty of finding men who are really qualified in the last instance to do such work, there is considerable basis for advising the conserving of such talent entirely for the second function and placing the supervision of the preparation of the case for trial in the hands of a separate official, inferior to and under the control of the judge. This procedure has proved its efficiency in the work of the English Masters who handle the preparation of every case, leaving for the judges only the actual decision. Undoubtedly in a complete reform of any system, this should find a place in the minds of those executing the reform.

In this connection it is interesting to note the proceedings of the trial after the case is fully prepared for it. It is common practice throughout the United States and the rule and not the exception in Maryland that the judge sits more as referee of a duel between opposing lawyers than anything else. On the other hand, in England the judge takes an active part in the whole trial. It is his duty to see that the jury is properly selected and at any time during the trial he does not hesitate to stop improper questioning of counsel or to bar any testimony that may not directly aid in the determining of the issue. After the evidence is in, he holds it a part of his duty to comment upon such evidence for the purpose of sifting out the material from the immaterial and to sum up the facts in such a way that the jury can reach an intelligent decision. The opposite is usually the case here. The counsel rather than the judge take charge of selecting the jury being entitled to their set number of peremptory challenges and any number of challenges for cause. During the trial, the Maryland judge sits little more than as a referee and he is not allowed at the end to comment on the facts, but only the law; and in criminal cases the jury

must be left to judge both the law and the facts.³⁸ Undoubtedly, the English practice is far more desirable and there is no excuse at all for the practice of making the jury complete judge of both the law and the facts in criminal cases.

Many prominent jurists take the position that the judge should play a greater part in the trial of the case and favor allowing him to comment upon both the law and the facts in presenting the case to the jury. The Honorable William H. Taft in an address to the Civic Forum of New York City, as far back as 1908 said:³⁹

The power of the court to comment upon the evidence, to point out its strength or weakness, can never take from the jury its authority to decide upon the facts. The restoration, therefore, of the procedure which obtained at the common law, and which still obtains in England, in the courts of the United States and in some state courts, by which the verdict rendered is the result of the independent judgment of the jury guided both by instructions by the court as to the law and also by suggestions and comments as to the facts, could work no injustice to any person brought into court, and would secure not only greater efficiency in the enforcement of the criminal law, but also much greater speed in the disposition of cases.

Mr. Chief Justice Taft undoubtedly speaks the truth in the above quotation, for indeed we have passed little beyond the wager by battle when we have replaced a trial by might only with a trial by wits.

That our trials amount to trials by wits of the participating attorneys may be traced as well to the rigid rules of evidence used as to the lack of participation by the judges. A good example is that which forbids the use of any form of hearsay evidence, no matter how well substantiated. The only person who witnessed a heinous crime may have told the same story of it to twenty people or have written it down, but the testimony of none of the twenty nor of the writing is admissible and the criminal must go unpunished if the sole witness has since died. Another rule that seems to block justice without justification in criminal cases is that which

³⁸ Maryland Constitution, Art. 15, Sec. 5.

³⁹ "Delays and Defects in the Enforcement of law in this country" Reproduced in Paul S. Reinsch: Readings on American State Government, 173 et seq.

protects the accused in his right to refuse to testify and forbids the judge to comment on his failure to take the stand. With regard to this rule, for example, the National Crime Commission in its outline of a Code of Criminal Procedure provides as follows:⁴⁰

The defendant shall be a competent witness in his own behalf and if he testifies shall be subject to cross-examination as any other witness. If he fails to testify as a witness, his failure to do so may be commented on by the court and counsel in their statements to the jury.

The prevailing American rule that a Defendant's failure to testify is no evidence of guilt is contrary to the common sense and experience of mankind, and should be modified. It does not obtain in England, Canada, or any other country where the Jury System prevails.

The two rules selected above are mere examples selected at random (not necessarily the worst) of the rigid rules that bind the courts in reaching the facts of a particular case and aid the lawyers in obscuring them in many instances. Undoubtedly the reason for many of such rules has ceased to exist and, if they are aids in some cases, in many others their rigidity prevents a proper ferreting out of the evidence. The observation of the rules in such instances is as unjustifiable as it is unreasonable.⁴¹

Closely linked up with the whole process that we have been discussing is our method of trial by jury. Undoubtedly special pleading was a development entirely for the purpose of putting a single issue clearly before the jury and the rules of evidence were formulated largely for the purpose of protecting the ears of the jury from certain considerations that might prejudice their judgment. We can look with profit, therefore, to this instrument of our system which in addition to causing these complications has itself been so severely criticized.

⁴⁰ Manuscript of a report of the Sub-committee on Criminal Procedure and Judicial Administration. Hon. Herbert S. Hadley, Chairman.

⁴¹ See Professor E. R. Sunderland's article, "The Problem of Trying Issues," begun in the *Journal of the American Judicature Society* for April, 1927, and concluded June, 1927, for an interesting treatment of the whole problem.

The discussion on the jury system, like most of our prior discussions in this chapter, would have application in most of the States of the Union. In studying juries we must first distinguish between the use of juries in criminal and in civil trials and study their use separately. Nowhere is there a general proposal to abolish trial by jury in criminal cases, while there is considerable agitation along that line with regard to civil suits. Everywhere there does exist agitation for the reform of juries in both classes of litigation.

In criminal trials the petit jury developed as the protector of the individual's rights; it has become of late the bulwark of criminals to delay, if not absolutely to defeat, justice. One main reason for this is the unanimous verdict that is required for conviction in all cases. As a result of this rule, the presence of a single irrational, biased, or corrupt juror may disrupt the whole process of justice by making it necessary for the judge to order a new trial because of a "hung jury," notwithstanding overwhelming evidence of guilt that had convinced the other eleven. This is an evil that may be corrected by providing for less than a unanimous verdict except where the death penalty may be imposed, in which case it should be retained. The National Crime Commission in outlining a Code of Criminal Procedure⁴² lays down the following rule:

In all felony cases a five-sixths verdict of a jury shall be sufficient to convict, except in cases where death may be the penalty imposed, and in which cases the verdict of the jury must be unanimous. In misdemeanor cases triable before a jury the jury shall consist of six, and a five-sixths verdict shall be sufficient to convict. The Defendant, in any case except where the death penalty may be imposed, may waive a trial by jury and have the case tried by the court. In all jury trials, only the question of guilt shall be decided by the jury, and the trial judge shall fix such punishment as may be authorized by law. Before sentence the judge shall be advised of the Defendant's criminal record so far as obtainable, and may seek information as to his mental condition.

In many states a verdict by fewer than all of a jury is permitted in civil suits, and in several states in criminal trials. Experience has proved the wisdom of such provisions. The same system should be applied in criminal cases in all states. In misdemeanor cases, it is believed that speedy and impartial justice can be obtained by a

⁴² Quoted above, p. 79.

jury of six. If a defendant is willing to waive a jury and submit his case to the judge, the statutes of all states should be elastic enough to permit this to be done.

It seems that this relaxation of the common law requirement is a reasonable one without impairing the protection of the accused in the instance where he is innocent. It recognizes the Maryland principle of allowing the trial to be without a jury at the election of the accused, limiting it, however, to non-capital cases. This practice works exceptionally well in Maryland and has been a part of our system since colonial days as far as the records reveal.⁴³ That it saves time is unquestioned and that it gives good results is the testimony of practically everyone acquainted with it. A quotation from Chief Judge Bond's rewritten statement⁴⁴ of the Maryland practice shows the extent to which the practice is used in Maryland:

Within the memories of living men far the greater number of trials in criminal cases in Baltimore City have been held before judges alone. A like experience is reported from the county courts. In the year 1924 over 90 per cent. of all the cases tried in the Criminal Court of Baltimore City were so tried. A count made ten or twelve years earlier showed 70 per cent. so tried, and this is probably the lowest percentage now likely in the course of any of the variations. Ordinarily two criminal courts are sufficient to care for the criminal dockets in the city, which has a population of nearly 800,000. At times there is not enough unfinished business for two courts, and one is able to keep up the work. It is ordinarily possible to give trials without any delay beyond such time as may be needed for preparation, and there are times when the court seems too close on the heels of the Grand Jury, when the court is prepared to give trial on the day after indictment. For some years, now, only one jury panel has been kept in attendance upon the two criminal courts, and, even so, the jurymen spend much of their time sitting aside spectators. Of the 1,500 criminal cases docketed during the four months of the January, 1925, Term of the Criminal Court of Baltimore City, all except 177, mostly those last docketed, were disposed of before the final day of the term. Unquestionably this comparatively rapid disposal of business is due to the prevalence of trials without juries.

This practice has undoubtedly been a success in Maryland,

⁴³ See Massachusetts Law Quarterly, "The Maryland Practice of Trying Criminal Cases, at the Election of the Accused, by judges alone, without Juries," by Judge Carroll T. Bond.

⁴⁴ Judge Bond rewrote this article in order to answer requests for copies which were unavailable.

although it has not found favor in many other States. Connecticut in 1921⁴⁵ made provision for the Maryland practice in her system and has, according to the clerk of the court in Harford, found it a success.⁴⁶

There is another reform proposed for juries in criminal trials that would find application in Maryland, especially since such juries are made by our Constitution judges of both the law and fact.⁴⁷ It is to give the judge freedom to instruct the jury as to the law and also to comment on the fact if he sees fit. The National Crime Commission in its model Code for Criminal Procedure again expresses the idea in as concise a form as possible:

In the conduct of the trial, including the examination of witnesses, the judge shall have the same powers as at common law. He shall instruct the jury as to the law applicable to the case and in said instructions may make such comments on the evidence and the testimony and character of any witness as, in his opinion, the interests of justice may require,—provided, however, that the failure of the Court to instruct on any point of law shall not be ground for setting aside a verdict of the jury unless such instruction is requested by the Defendant. Such instructions and comments by the trial court shall be reduced to writing, before delivery, unless a stenographic record is made at the time of delivery.

During the early days of our country's history in many states laws were passed and constitutional amendments were adopted which had the effect of reducing the power of the judge to that of a mere umpire unconcerned in the actual discovery of criminal guilt or innocence. In a few states, and in the Federal courts, the power of the judges remained as it originally existed according to the common law of England. The purpose of the section is to restore this judicial power in those states where it was unwisely taken away to the unfair advantage of criminals financially able to employ eloquent and resourceful lawyers.

These suggestions represent the crux of the criticisms and reforms for the use of the petit jury in criminal trials. The object was not to abolish the procedure of jury trial but to improve it. There are other questions which are not as often pressed that are worth some consideration here, the size and the selection of the jury.

Both as regards size and manner of selection we have blindly followed custom without consideration of the needs

⁴⁵ Acts 1921, Ch. 267, Sec. 2.

⁴⁶ Bond, Criminal Trial Without Juries, 9.

⁴⁷ See above, p. 69.

that the jury is to fill and the efficiency with which it may meet them. There is surely no charm in the particular number of twelve and there is no reason why a smaller number, which would be more economical and efficient, should not be used, as is done in many States. This would also make it easier to secure competent men since fewer would be required. The question of securing competent men brings up that of the method of selection. The present one of selecting jurors at random from the community at large does not insure the obtaining of a set of men properly qualified for the task. Mr. W. F. Willoughby lists the following rules for the proper selection of a jury: ⁴⁸

“1. The best known methods of securing jury lists should be adopted so as to insure, as far as possible, the selection of the best material obtainable for jury service, and the elimination from that service of the so-called professional talesman.

“2. The securing of the jury should be under the guidance and control of the trial judge and his judgment and rulings should be final and conclusive except in case of a clear abuse of discretion affecting the merits of the controversy.

“3. The number of peremptory challenges should be materially reduced.

“4. The examination of a proposed juror should be confined to the essential questions relating to his qualifications, namely, as to whether he is related to either of the parties, and as to whether he can return a fair and impartial verdict on the evidence.

“5. The fact that a juror has casually formed or expressed an opinion which will require evidence to remove ought not *prima facie* to be held a disqualification.”

Several of these principles we have adopted earlier in our discussion, and we feel that we can easily adopt the rest as being desirable guiding rules in aiding to get qualified juries. This competency being assured, the writer feels that the

⁴⁸ Manuscript on Judicial Administration.

criminals would not look to the jurors as their protection against justice, especially with the power to freely instruct in the hands of the judge and the possibility of being convicted by a majority verdict in mind.

If the jury is retained in civil cases, practically all of the above suggestions are capable of application. Smaller juries, more carefully picked as to their qualifications and less subject to discard for being intelligent, working in closer harmony with the judge and with power to render a majority verdict would go far toward eliminating much of the present dissatisfaction with the institution. Lawyers would not so frequently say they want their cases tried by the judge alone if they are meritorious and with a jury if they are bad.

There are many, however, who advocate the complete abolition of the jury in the trial of civil cases, claiming delay would be abolished, as effective results obtained in all cases, and better results in many. We are in general inclined to agree with this view. Practice in England has shown that the jury may well be abolished in contract actions. For certain tort actions, however, such as defamation, breach of promise suits and the like, the jury, rightfully employed, is fully justified by results. We draw our conclusions, therefore, that the jury system will stand a complete overhauling and reform in many places and that it might well be abolished from civil actions "*ex contractu*" except perhaps in special instances.

With that we must end our present treatment of the problems of general trial courts. Questions that arise with regard to appeals may more appropriately be handled in the next chapter and we have avoided them here. As we stated at the beginning of our discussion, the problems that arise are many and complicated and are not to be dismissed with an arbitrary consideration. We have tried to treat with the most outstanding ones and suggest the leading proposals by way of reform. Many of these have been but suggestions that may or may not be desirable, but only by such speculations and willingness to experiment will the perfection of our system be obtained.

CHAPTER IV

THE COURT OF APPEALS AND THE PROBLEM OF APPEALS GENERALLY

The Court of Appeals of Maryland is composed of the chief judge of each of the first seven of the judicial circuits of the State and a judge specially elected from Baltimore City, one of whom is designated by the governor, by and with the advice and consent of the Senate, as the Chief Judge.¹ The judge from Baltimore City is elected by the qualified voters of the city for a term of fifteen years and his sole duty is to sit as judge of the Court of Appeals from Baltimore City.² Although the Constitution gives the Legislature power to prescribe other duties for him, there have been no such duties assigned to date.

The Court of Appeals holds its sessions in the City of Annapolis on the second Monday in January, the first Monday in April, and the first Monday in October every year, such sessions not to continue less than ten months in the year if the business before it shall so require.³ This is provided by the Constitution allowing, however, the judges to temporarily change their sittings elsewhere upon sufficient cause and the Legislature to direct other terms of court.

The jurisdiction of the court is coextensive with the limits of the State, but as its name implies it is an appellate court only, without any original jurisdiction whatever. It has been held that the Legislature can not confer original jurisdiction upon the Court of Appeals,⁴ though the court may

¹ Maryland Constitution, Art. 4, Sec. 14.

² *Ibid.*

³ *Ibid.*, also Bagby's Code, Art. 26, Sec. 35.

⁴ *Hendrick v. State*, 115 Md. 552; *Sevinsky v. Wagus*, 76 Md. 335. In the latter case it was held that a statute which provided that "the Court of Appeals, and the Chief Judge, shall have the power to grant the writ of "habeas corpus," and to exercise jurisdiction in all matters relating thereto throughout the State" was unconstitutional and void as the Legislature had no power to confer upon the appellate court such original jurisdiction.

grant a mandamus, certiorari, or other appropriate writ in aid of its appellate jurisdiction.⁵ An early Act authorizing any party to a cause to have a transcript of chancery proceedings transmitted to the Court of Appeals for the purpose of getting its opinion touching the validity of certain Acts, and on such other points as the parties might by agreement have submitted to the lower court, was likewise held unconstitutional.⁶

It has been, in the writer's opinion, a wise policy that has checked these attempts to enlarge the functions of the Court of Appeals beyond their appellate scope. The court's time is filled with the appeal business that it handles and any enlargement of its duties could but have resulted in a congestion that would have slowed up its business and lessened its effectiveness.

In deciding cases, four judges constitute a quorum and no cause can be decided without the concurrence of at least three.⁷ Any judge who heard the case below can not participate in the decision of that case on appeal. The Constitution further provides that all cases shall stand for trial at the first term after the transmission of the record, that the judgment of the court shall be final and conclusive, and that in every case an opinion, in writing, shall be filed within three months after the argument or submission of the cause.⁸ This latter provision has been held to be directory and not mandatory⁹ and also not to apply to a case where the judgment of the lower court is affirmed because the judges of the Court of Appeals are evenly divided on the question.¹⁰

Under the provision that the judgment of the court shall be final and conclusive, an Act of 1872 purporting to authorize the court to reopen and rehear certain cases and pass such judgments, decrees, etc., as right and justice require

⁵ Ibid.

⁶ *Lawrence v. Hicks*, 2 G. & J. 386.

⁷ Art. 4, Sec. 15.

⁸ Ibid.

⁹ *McCall's Ferry Co. v. Price*, 108 Md. 112.

¹⁰ *Johns v. Johns*, 20 Md. 61.

was held invalid and unconstitutional.¹¹ This section was also looked to by the court in refusing to express opinions on moot questions or abstract propositions and holding that the words of the Constitution contemplated action that would be effective and binding.¹²

The provision directing that all cases shall stand for hearing at the first term after the transmission of the record is not designed as a limitation upon the power of the court to order a case to be heard at the term during which the record is received, but rather to prevent delay beyond the first term after the receipt of the record.

The Constitution states that "provision shall be made by law for publishing reports of all causes argued and determined in the Court of Appeals, which the judges shall designate as proper for publication."¹³ Under this, the law provides for the appointment by the judges of the Court of Appeals of a "State Reporter and Codifier," to hold office for four years unless sooner removed from office by the judges and reeligible from time to time.¹⁴ He receives a salary of \$3,600 a year¹⁵ and in addition to various other duties must

¹¹ *Dorsey v. Garey*, 37 Md. 74. The act was also held invalid as an attempt of the legislature to exercise judicial powers and contrary therefore to the Article 8 of the Declaration of Rights which reads "That the Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said departments shall assume or discharge the duties of any other."

¹² *State v. Shields*, 49 Md. 305. Likewise, the courts in Maryland have no power to render "advisory opinions" to the legislature or to the executive or administrative officials because of their rigid adherence to the doctrine of the separation of powers as written in the constitution. The constitutions of at least seven states, however, do provide for such opinions—Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota. The constitution of Idaho (Art. 5, Sec. 25), although making no provision for advisory opinions, requires the judges of the trial courts annually to report to the Supreme Court of the State the defects or omissions in the laws of the State that have come to their attention and requires the latter body to make a similar report to the governor. (See W. F. Dodd; *State Government*, 303; and for a full discussion, Arthur R. Ellingwood; *Departmental Coöperation in State Government*, New York 1918).

¹³ Art. 4, Sec. 16.

¹⁴ Bagby's Code 1924, Art. 80, Sec. 1.

¹⁵ *Ibid.*, Sec. 2; Acts 1924, Ch. 253.

see that the constitutional provision is carried out and such cases reported as the judges of the Court of Appeals direct, for which he is allowed an extra \$500 each year.¹⁶

There is a clerk of the Court of Appeals elected by the legal and qualified voters of the State for a term of six years, holding office until his successor is duly qualified.¹⁷ He is subject to removal by the court for incompetency, neglect of duty, misdemeanor in office or such other cause as may be prescribed by law, and in case of a vacancy, the court has power to appoint a clerk to hold office until the next general election for the General Assembly, when a new clerk shall be elected for a six-year term.

Under the Constitution the court was given power to make and publish rules for the prosecution of appeals and also to make rules governing the proceedings in equity.¹⁸ The Constitution specially states that in these rules it is to be their purpose to promote brevity and conciseness, and abolish all unnecessary costs and expenses. One might say that this vests a certain amount of legislative power in the court, but the exercise thereof has not been held unconstitutional.¹⁹ It is a wise provision to vest this power in the court since the matters to be regulated are more within its peculiar knowledge than that of the Legislature. It is to be noted, though, that many if not most of the rules have been enacted as laws

¹⁶ Ibid., Secs. 3, 4. The Maryland reports in bound form from 1658 to date are as follows:

Harris and McHenry.....	4 vols.	1658-1799
Harris and Johnson.....	7 "	1800-1826
Harris and Gill.....	2 "	1826-1829
Gill and Johnson.....	12 "	1829-1842
Gill	9 "	1843-1852
Maryland Law Reports.....	152 "	1852-1927

In addition there are several volumes of early chancery reports which cover for intermittent years the decisions of the early chancery court of Maryland which was abolished in 1854 and the system of law and equity incorporated as one. These reports are:

Bland's Chancery Reports.....	2 vols.	1811-1832
Maryland Chancery Reports...	4 "	1847-1852

¹⁷ Maryland Constitution, Art. 4, Sec. 17.

¹⁸ Ibid., Sec. 18.

¹⁹ In re Paca, 140 Md. 51.

by the General Assembly.²⁰ How unfortunate this might be if the rules of the Legislature had to be absolute is not a problem, because it has been held that under the Constitution a subsequent rule by the Court of Appeals will override a statute on the questions of regulating appeal procedure.²¹ This means, of course, that the laws passed by the Legislature must be satisfactory in the eyes of the court or it can modify them to give the desired results.

Under the rules of court and statutes now in force, an appeal must be taken within sixty days of the final judgment entered below, and the record filed in the office of the clerk of the Court of Appeals within ninety days after the entry of the order for appeal. In accord with the constitutional provision mentioned earlier, it has become a tradition of the Court of Appeals that it never adjourns with an untried case on its docket unless the case goes over at the request of counsel for illness or some other like cause. That means that all cases are heard at the term to which they are docketed, and the opinion is in nearly all cases filed within two months after hearing. This gives a rather prompt decision of appeal cases and the court has received commendation from lawyers of note for its prompt work. Mr. Poe in his work on Pleading and Practice²² makes the following favorable comment in concluding his discussion of the court:

The practical result of these provisions may readily be seen in

²⁰ Bagby's Code 1924, Art. 5.

²¹ *Meloy v. Squires*, 42 Md. 378. The case held that an act passed by the legislature in 1864 which said that the Circuit Court from which an appeal is taken is authorized to strike out the entry of the appeal, if through the negligence or omission of the appellant, the record shall not be sent up to the Court within nine months after the Appeal is entered, would be modified by number 10 of the "Rules and Regulations Respecting Appeals" laid down by the Court of Appeals which said that transcripts in appeals from courts of equity must be transmitted within six months after the appeal is prayed.

The provision in the constitution is (end of Sec. 18 of Art. 4) "And all rules and regulations hereby directed to be made shall, when made, have the force of law until rescinded, changed or modified by the judges or the General Assembly." The above case held that under this a subsequent rule of court might modify the previous law.

²² Pleading and Practice, I, 7.

the fact that, while in many of the States of the Union and even in the Supreme Court of the United States the delays incident to appeals are so serious as oftentimes to amount to almost if not quite, a denial of justice, in Maryland the docket is regularly disposed of every term; and it seldom happens that, except by the consent of the parties, an appeal is kept pending as long even as a year. Indeed, when the parties are diligent in securing the prompt transmission of the record, it is a common occurrence for cases to be heard in our Court of Appeals within thirty days after the decision of the court below. This regular and prompt dispatch of business is worthy of notice and the established diligence of the court accomplishes the two-fold purpose of doing justice "speedily without any delay" and also of putting an end almost entirely to that class of appeals formerly so numerous, which were taken simply for the purpose of gaining time. No reference to the present Court of Appeals of Maryland would be at all complete which, while recognizing the eminently high judicial character and learning of the court itself, omitted to mention the promptness with which all appeals are heard and to contrast this with the unfortunate delays only too prevalent in many other similar tribunals.

This is a high tribute to the Maryland Court of Appeals and all the more so in the light of the general congestion that exists elsewhere with regard to appeals.

Looking at the question of appeals generally and the need for an appellate tribunal, we may say that the work serves two purposes: first, to provide a unified interpretation of the law, which is undoubtedly essential; and second, to provide a means for correcting errors of the tribunals first hearing the case. In examining the nature of these errors one finds that they may be of three kinds: errors in the determination of the facts, errors in the procedure used, and errors in the application of the substantive law to such facts. Because of the necessary expense of appeals, it is of importance to examine these classes to determine the extent to which appeal is and should be allowed with regard to each.

As to errors of fact, we have already noted that the Court of Appeals of Maryland deals only with errors of law and considers the facts only in so far as it is necessary to determine whether an error of law has been made. Undoubtedly, this is desirable under our present system.²³ The court which hears the witnesses in the first instance and which can ques-

²³ See below, p. 94, for desirability of letting court hear few facts if necessary to a final disposition of the case.

tion them in open court should certainly be most competent to determine the actual state of affairs. In addition, wherever the petit jury is used as an agency to determine facts, its decisions should be given controlling weight. If mistakes are made, and it is possible for any human agency to err, more harm would be done, as a matter of practical expediency, through the added expense and delay entailed by permitting a retrial of the facts in the appellate tribunal, than good accomplished through the occasional correction of error in judgment on the part of judge or jury. Then there is no reason to believe that the percentage of error made in the appellate determination of the facts might not almost equal that of the lower body. It should be mentioned that in case of jury trial when a verdict is brought in which is clearly against the weight of the evidence the trial judge may himself set it aside. This is sufficient check on the jury's determination of fact and no appeal should be necessary on these questions.

When we examine the extent to which appeal should be allowed from the trial court's determination of the procedural rules applied, we face a more difficult situation. Undoubtedly most of the appeals find basis on some mistake made in the procedure of the trial court and unfortunately so in the opinion of students of the subject. Many jurisdictions allow a reversal for a mistake, no matter how slight its bearing might have been on the final outcome of the case below. Maryland has wisely adopted the principle that no case shall be reversed when the error was non-prejudicial, one which did not effect the actual decision of the case in the lower court. This is a logical and sensible distinction to draw. There is some opinion that it should be carried still further and appeal allowed not as a matter of right but merely as a matter of grace upon the parties showing a meritorious case for appeal. This, along with the idea suggested in the previous chapter of having the rules of procedure determined by the courts themselves, would do much to eliminate the many needless appeals that we now have in this division.

Before proceeding to a discussion of allowing appeals only where the appellate court thinks it proper, we may give a word to the third class of appeals when the error is in the substantive law applied. Here we have present the factor that is lacking in the other two classes, need for a uniform interpretation of the law. We feel, therefore, that in all cases when the point at issue is the interpretation or construction of substantive law, the possibility of carrying this issue to the court of last resort should exist. This does not necessarily mean that it should exist as a matter of right in all cases, but that the power should be in the appellate court to review such a decision of a lower court where it might think it proper.

In Maryland, as elsewhere in the United States, the power to secure a review of the decision of the lower court by the Court of Appeals has been treated as a matter of right to be used by the litigant as he sees fit. It is submitted that this as a general principle is not necessarily right nor productive of the best justice for the greatest number of people. There are many objections to be stated to an unlimited right of appeal such as we now have: firstly, it may be used for delay by one who wishes to postpone an obligation as long as possible; secondly, it is so expensive that the poor litigant is put at a disadvantage as compared to his richer opponent; thirdly, these two combine to make the threat of an appeal a bludgeon with which to obtain an inequitable settlement of a claim.

In Maryland, where there is only one appellate tribunal and no possibility for a double appeal, such as exists in many States with intermediate appeal courts, the arguments are not as weighty as they would otherwise be. However, there is no reason why the same principle that effects a meritorious remedy with regard to appeals in such cases of double appeal could not be applied to our system if after a careful study it were determined that appeals as a "matter of grace" are effective to handle all cases where there is any justification for an appeal. The writer feels that this would be true.

An Act passed by Congress in 1925 makes the following provisions as regards the federal system:²⁴

Sec. 240 (a). In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect as if the cause had been brought thereby unrestricted writ of error or appeal.

(b). Any case in a Circuit Court of Appeals where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such state statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

(c). The judgment or decree of a Circuit Court of Appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.

From this the whole question as to whether the action of a Circuit Court of Appeals may be reviewed by the Supreme Court rests with the latter body to be determined by it, except in the instance when the defeated party relied on a State statute which the Circuit Court of Appeals declared invalid, in which case appeal continues to exist as a matter of right. This system of providing that appeals to the court of last resort may be prosecuted only by way of certiorari has been adopted and has worked most successfully in New York, Ohio, Georgia, Illinois, California, Indiana, and in other States.²⁵

²⁴ This reference is given to the bill by Mr. W. F. Willoughby—Public No. 415, 68th. Cong. "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Court of Appeals and the Supreme Court and for other purposes." Approved Feb. 13, 1925. For an analysis of the bill and arguments in its support see Hearings before a Sub-committee of the Committee of Judiciary of the Senate on S. 2060, Feb. 2, 1924. Included in the hearings is an analysis of the bill and statement of reasons for its enactment prepared by a Committee of the Members of the Supreme Court.

²⁵ Congressional Record, Daily Edition, Feb. 3, 1925. Letter by Senator Copeland.

It seems that our system of allowing appeals in all cases as a matter of right might well be examined in the light of these considerations.

The last problem that arises concerns the nature of the appeal once it is allowed—should the appellate court have power to merely review the proceedings of the case and if error is found remand it for further trial, with the possibility of future error and appeal, or should the decision on appeal be the final determination of the case? It may be said that the latter is far preferable. The classic example of extended appeals and their harmful results is the New York case so often called to mind since its citation by the late Judge Simeon E. Baldwin:²⁶

In 1882 a brakeman was injured on a New York railroad. He brought suit against the company and in 1884 recovered \$1,000 damages. The judgment in 1886 was reversed on appeal. In a new trial he got a verdict for \$4,900. This was appealed to two courts successively. The first affirmed and the second reversed the judgment. In 1889, there was a third trial at which the company won. Two appeals by the brakeman followed. In the first the intermediate appellate Court in 1884 decided against him. On the second in 1897 the court of last resort decided for him. For the fourth time the case came on in the trial court and a verdict for \$4,500 was recovered. The company appealed and with success. A fifth trial gave him a verdict for \$4,900. This too was set aside on appeal. A sixth trial followed with exactly the same results. In 1902 the seventh and final trial took place. The verdict this time was for \$4,500. The company appealed again but was defeated.

As Judge Baldwin remarks, "A law suit that embraces seven appeals and lasts for twenty years is, of course, a rarity, but the system of administration of justice under which such things are possible is faulty in the extreme."

Such a prolonged suit would never be likely to occur in Maryland, with only one step in the appeal procedure and where the appellate tribunal lays down principles to guide the lower court in the new trial so that this may result in a final disposition of the case. But, even where there is the possibility of the need for a new trial after appeal, there is a certain amount of jeopardy to the complainant's rights because of the difficulty of getting testimony and witnesses for the second trial. Once again we may look to England as

²⁶ The American Judiciary, 366, 367.

the model of efficiency. The Judiciary Act there, along with introducing the other reforms that we have previously had occasion to mention, did away with the evil of retrials. Not only was the right of appeal carefully safeguarded, but the principle was established that the appeal, when allowed, should partake of the nature of a retrial and that the result thereof should be a final decision based upon a review of all the points in dispute. The appellate Court may receive new evidence coming to light after the trial and do anything else necessary to a final disposition of the case. The adoption of the same principle would be a decided improvement to our system. There should be but one appeal (no intermediate court) allowable, at the discretion of the appellate court after a complete trial of the case on its merits in the lower court, embracing at one time all the points which the appellant desires to raise in respect to the action of the trial court, and arriving at a final decision of the case.

It may be said, then, that although the Court of Appeals of Maryland is showing praiseworthy work, there is room for improvement along the lines suggested if the highest efficiency is to be attained in our system of judicial administration.

CHAPTER V

QUASI-JUDICIAL PROCEDURE

No discussion of a modern American system for settling disputes between the various members and parts of society would be complete without a consideration of those agencies and forms of procedure which, though not strictly judicial, have come to handle many of the burdens formerly cast on the courts—agencies such as the Public Service Commissions and Workmen's Compensation Boards and procedure by way of conciliation and arbitration. Both of these movements, one toward administrative action, the other toward compromise, have come to play important roles in the settlement of civil causes. Reginald Heber Smith, commenting on the former, says:¹

Such tribunals have sprung up with amazing rapidity, they have taken over an enormous amount of litigation formerly handled by the courts, and the law concerning administrative justice is the most rapidly growing branch of law in our entire jurisprudence.

This movement, the vesting of judicial business in the hands of administrative boards, is manifested in Maryland chiefly in the work of the Industrial Accident Commission, the Public Service Commission, and the State Tax Commission,² which will be considered in order.

Before the passage of the Workman's Compensation Law in Maryland, as elsewhere, the courts dealt with a great volume of business resulting from claims arising out of injuries received in the course of employment. Great delay and costs in the settlement of such claims resulted in gross injustice to the injured workmen. Many times they were prevented from recovering at all by the three common law defenses that the employer might set up: (1) assumption of risks, (2) contributory negligence on part of workmen, and (3) negligence

¹ Justice and The Poor, 83.

² These are the characteristic administrative tribunals found in the most advanced systems in this country and they are handling an ever increasing volume of business in all States where they exist.

of a fellow servant.³ If the workman finally recovered, he usually had to pay an exorbitant fee to some lawyer who had taken charge of the case on the contingent fee basis because the workman was too poor to retain him on a regular fee. The whole situation was highly undesirable, the courts were over-burdened, and the results obtained were generally unsatisfactory. The remedy came in the passage of the Workmen's Compensation Law of Maryland and its enforcement in the first instance by an administrative board, the Industrial Accident Commission,⁴ composed of three members. appointed by the governor.

The general provisions of the Maryland law are similar to those of other States. It provides, first, for the payment of compensation to employees injured in certain extra-hazardous employments,⁵ and to their dependents in case of death; second, that all employers in such occupations shall secure the payment of such compensation by insuring their liability in an approved stock company, or the State Accident Fund, or by proving to the satisfaction of the Industrial Accident Commission their financial ability to be their own insurers. The Commission's duty of administering the law involves determining what occupations are included (in addition to those specifically enumerated in the Act), receiving reports of accidents, investigating and adjudicating claims under the Act, and the administration of the State Accident Fund. Hearings are held in contested cases. Appeal lies from any decision of the Commission to the Circuit Court of the County or to one of the common law courts of Baltimore City having jurisdiction over the place where the accident

³ Commons and Andrews: Principles of Labor Legislation, 388.

⁴ Bagby's Code 1924, Art. 101, completely states the Maryland law of workmen's compensation. The constitutionality of the legislation sustained in the case of *Solvuca v. Ryan*, 131 Md. 281.

⁵ This has come to include workers in practically all employments except those specifically exempted from the operation of the act (Code Art. 101, Sec. 65, Sub. Sec. 3), farm laborers, domestic servants, country blacksmith, wheelwrights or similar rural employments unless their employers choose to be included, and casual employees or any employers who are employed wholly without the state.

occurred; and further appeal lies to the Court of Appeals. Provision is especially made that the decision of the Commission shall be *prima facie* valid, and that the proceedings on any appeal shall be informal and summary. It may be said that comparatively few appeals are taken.

A glance at the business handled between November 1, 1925, and October 31st, 1926, will show the importance of the work of the Accident Commission. There was a total of 41,616 industrial accidents reported, representing an increase of 7,633 cases over the number reported for the previous year. Out of these there were 15,449 claims filed for compensation, of which 162 were claims in fatal accidents, as against 14,565 claims filed during the preceding year, 163 of which were claims in fatal cases. There were 1,199 formal hearings on claims and only 123 appeals from the decisions—51 by the employer and the insurer and 72 by the claimant. A total of benefits paid out and outstanding for payment as a result of the year's work amounted to \$2,480,-998.62.⁶

This method of settlement of the claims of injured workmen has proved highly satisfactory. Delay and expense have been greatly reduced and the contingent fee system of counsel practically eliminated. Appeals to the courts are rare, largely as a result of the placing of the application of the law to individual cases on a systematic basis (there are set rates of compensation for all sorts of injury), so that ascertainment of fact is the chief work of the Commission. In short, the substantive law has been remedied by the substitution of the principle of insurance for that of liability, and the procedural law, by the substitution of administrative for judicial action.

So efficient has this substitution been that there is a strong movement for the making of similar provision for a like settlement of all injuries arising as a result of automobile

⁶ Statistics taken from the Twelfth Annual Report of the State Industrial Accident Commission of Maryland. This is the latest published report of the commission.

accidents, as also the adjustment of injuries to passengers on all railways.

The Public Service Commission of Maryland (or, under its technical name, The Department of Public Utilities) was organized in 1910,⁷ modeled largely on the Federal Interstate Commerce Commission, the Public Service Commission of New York, and other similar State bodies. The board is composed of three members appointed by the governor for six-year terms, one term expiring every two years, so that the membership of the board is continuous. It has supervision of railroads, steam and electric; common carriers in general; gas corporations; electrical corporations; telephone companies; telegraph companies; water companies; steam heating and refrigerating companies; express companies; sleeping car companies; steamship, steamboat, motorboat, and sailing boat companies doing business as common carriers in so far as such business is intra-State within the State of Maryland. Its supervision and jurisdiction cover the service furnished, the rates charged, capitalization, issue of stocks and bonds, the right to exercise franchises granted by the counties or the cities, the right to fix rates and standards for service, and general supervisory and regulatory powers.⁸

The Public Service Commission in the exercise of its powers to secure an effective control over public utilities has hearings and settles cases on the fixing of rates, the granting of franchises, complaints against public utilities for violating rules of the Commission, and like matters. An experienced and qualified attorney is appointed by the governor for an indefinite term to serve as People's Counsel before the committee.⁹ Procedure before the Commission is unhampered by rules of evidence, and it has developed, like its sister bodies in other States and the Federal Government, an efficient method of settling disputes through the aid of investigators and experts. It often investigates individual

⁷ Acts 1910, Ch. 180.

⁸ For complete statutory creation of and regulations for the Public Service Commission, see Bagby's Code 1924, Art. 23, Secs. 346-418.

⁹ Acts 1922, Ch. 29.

cases and grants redress with little expense to the complainant.¹⁰ Through it, numerous complaints are adjusted rapidly and satisfactorily, which under former conditions would never have been presented to a judicial or administrative tribunal or which would have dragged on indefinitely through a long trial in the courts.

Appeal lies from any decision or ruling of the Public Service Commission to the Circuit Court of each county or to any of the common law courts of Baltimore City, but as in appeals from the Industrial Accident Board, the decision of the Commission is "prima facie" correct.¹¹

While the Industrial Accident Commissions and Public Service Commissions are the ones usually brought to the fore by discussion of the conferring of judicial functions on administrative tribunals, the State Tax Commission of Maryland may well be placed in a class with them. This body was created by the General Assembly in 1914,¹² and is composed of three members appointed by the governor for five-year terms, not more than two of whom may be of the same political faith. It elects a secretary and appoints such employees as may be necessary.

The State Tax Commission has several functions, the chief one being to bring about a general equalization of assessments.¹³ It has power to establish forms of schedules, notices, etc., and also of assessment and collection books; to establish a uniform system of accounts; to require that all property in the State be reviewed for reassessment at least once in every five years; to confer with State officials of this State and taxing officials of other States in order to bring about a uniform system of taxation; and to provide for a system of

¹⁰ See the Report of the Public Service Commission of Maryland for 1926.

¹¹ Bagby's Code 1924, Art. 23, Sec. 408; Public Service Commission v. N. C. Rwy. Co., 122 Md. 388. This case also held that the court has no authority to determine what would be a reasonable rate for the service required or to establish rates, but is limited to determining whether the rates fixed by the commission are unreasonable or unlawful.

¹² Acts 1914, Ch. 841.

¹³ Bagby's Code 1924, Art. 81, Secs. 247-268.

inspection of licenses. It appoints a Supervisor of Assessments for each county of the State from a list of five residents of the county, nominated by the respective Boards of County Commissioners. These officers, paid by the County Commissioners, are to advise the Tax Commission of assessments as compared with valuation, to report all sales of property, and to perform such other duties as the Commission may assign them.

The Commission hears direct appeals from all the assessments entered by the County Commissioners of the several counties or by the Appeal Tax Court of Baltimore City, and the determination by the Commission as regards the assessment of property is final, as an appeal from a decision of the Commission exists only on questions of law.¹⁴ Herein lies the chief judicial function of the Commission as an appeal court from the hearings had before the various County Commissioners or the Appeal Tax Court of Baltimore City.¹⁵

The three bodies just described represent three leading types of administrative tribunals that are exercising in their work certain judicial functions, or at least doing business that was formerly left entirely to the courts. Undoubtedly they have proved efficient fact-finding bodies and instruments that afford a more prompt relief than the courts for many problems. Their future is a perplexing study, but if the present agitation for the extension of the principle of compulsory insurance to automobile accident injuries and to injuries of passengers on railways is successful, it is very likely that the administrative board will be the instrument used to administer the law.

Fully as interesting a movement as that of vesting considerable power in administrative boards that are handling controversies formerly controlled by the courts is that of conciliation and arbitration as methods of settling disputes. Conciliation is a voluntary affair or informal proceeding by

¹⁴ *Ibid.*, Sec. 253.

¹⁵ It may be noted that in connection with its powers to fix assessments, the Commission was given by the Act of 1924 the important duty of assessing the rolling stock of railroads.

which two disputants are enabled to discuss their disagreement before a "trained and impartial third person having the dignity of judicial office, who explains to them the rules of law applicable, informs them of the uncertainties and expense of litigation, tries to arouse their friendly feelings and suppress their fighting instincts, and if an adjustment agreeable to the parties is reached, draws up a proper agreement, has it executed, and gives it the sanction of a judgment. All of this is done without prejudice to the parties if adjustment fails and a trial is rendered necessary."¹⁶ Arbitration is similar to conciliation in so far as the end in view is the settling of controversies out of court through the good offices of a third party. It differs in that the function of the third party (or parties where more than one) is not merely to seek to induce the parties to amicably settle their claim, but is to render a decision himself which shall be a binding settlement between the parties.

Neither of these methods has received much recognition as a way of settling disputes in Maryland, at least so far as making legal provision for them is concerned. Conciliation receives no recognition at all and the nearest approach to it is the practice of settling out of court "by the attorneys for the opposing litigants." There is an arbitration article in the Maryland Code of General Laws, but it does not give a firm standing to arbitration,¹⁷ and arbitrations in accord therewith are few. It does little more than provide that a submission of a dispute to arbitration shall be valid, and does not adequately provide for the specific enforcement of agreements to arbitrate or for the reference of points of law arising in such arbitrations to the courts for rulings, both of which are outstanding features of the English system, where arbitration has achieved its chief success. The fact that our State has made little progress along these lines is all the more

¹⁶ R. H. Smith, *Justice and the Poor*. Practically the same definition is given in 73 *Annotated American Political and Social Science*, 112.

¹⁷ Bagby's Code 1924, Art. 7.

reason, however, for an examination into the success of these forms of procedure where they are in use.

Conciliation procedure has been in effect in Scandinavian countries for more than a century and is held in such high regard that nothing could induce the people of these nations to abandon the system.¹⁸ In Norway and Denmark, the Conciliation Court has jurisdiction of every civil proceeding, and before any law suit can be instituted the dispute must be submitted to the local Conciliation Commission, which consists of two members. The costs are seventy-five cents, the hearings are in secret, so that no disclosures may prejudice subsequent litigation, and lawyers are rigidly excluded. Proceedings are most informal, the disputants tell their own stories, and the Conciliation Commissioners endeavor to guide them to a fair adjustment. The results depend on the willingness of the litigants to come to an agreement. It is said that 75% of the disputes are settled in this manner in Norway and 90% in Denmark.¹⁹

The United States Bureau of Labor Bulletin No. 98 states that conciliation has played a leading part in the industrial courts of France, Switzerland, and Germany in the settlement of disputes between employers and employees.²⁰

The first successful attempt to introduce conciliation procedure into the United States was made in connection with the Small Claims Court of Cleveland. This court and the Municipal Courts modeling on it have been described in the chapter on "Petty Tribunals." The procedure in small claims cases in city courts has proved successful. Beyond that field only two States have ventured to go. North Dakota

¹⁸ See Smith, *Justice and the Poor*, The Journal of the American Judicature Society, June 1918, II, No. 11; The Atlantic Monthly, XLVIII, an article "Courts of Conciliation," by Nicolay Grevstad. The conciliation courts of Norway and Sweden have been in existence since 1795.

¹⁹ Grevstad, *Courts of Conciliation*.

²⁰ See United States Bureau of Labor Bulletin No. 98 (1912), for a full treatment of conciliation in the United States, Canada, Great Britain and Europe.

in 1921 enacted a law providing for State-wide conciliation procedure, and Iowa followed suit in 1923.²¹

A model Act submitted by the Journal of the American Judicature Society sums up the features of a State-wide plan for conciliation.²² Briefly, the plan is that no civil action shall be commenced (with a few exceptions) until the claimant shall have given the opposing party an opportunity to discuss a settlement in the presence of an assistant of the court known as a conciliator. If the party complained of does not appear in response to the request the conciliator certifies that the attempt at conciliation has been made and has failed, and the claimant is then entitled to obtain process. If he does appear it is then the duty of the conciliator to hear the statements of both parties and their witnesses and to counsel an amicable settlement agreeable to law and equity. If a settlement is reached the conciliator will certify it to the court, which will docket it as a judgment. If there be no agreement, the certificate of failure will be granted. Disclosures made at the conciliation hearing are not admissible as evidence in any subsequent proceeding. The conciliator is presumed to be a person of good judgment, representing the principal trial court, and answerable to it for all his acts.

A number of advantages may be ascribed to conciliation procedure: promptness in the settlement of controversies, the meeting of the convenience of the parties in respect to the time of the hearing, elimination of the heavy costs attaching to a formal trial in court, avoidance of the technicalities governing the giving of evidence and other aspects of judicial procedure, the preservation to a greater extent of good will between the parties, the placing of emphasis upon the doing of justice rather than following the strict letter of the law, and the relief of the court.²³ A consideration of these advantages and a glance at the success of the practice as used

²¹ For draft of the Dakota act see Journal of the American Judicature Society for April 1921, IV, 165, No. 6; for the Iowa Act, same Journal, June 1923, VII, 15, No. 1.

²² February, 1919, II, 152, No. 5.

²³ W. F. Willoughby, Manuscript on Judicial Administration.

in Norway and Sweden leads to the conclusion that it would be a valuable part of any system for rendering justice.

The same advantages equally characterize arbitration, and in practice it is a far more effective method of settling disputes. A distinguishing characteristic of British litigation is the almost total absence of commercial disputes from the calendars of the principal trial courts. This is almost entirely the result of the practice of commercial arbitration developed in England during the last half century. It is estimated that more than 100,000 cases are arbitrated every year.²⁴ Practically all trade agreements made in England contain a clause requiring the submission of disputes to arbitration, and such clauses are by the English law subject to specific enforcement if either party tries to avoid this obligation. This is the backbone of the English arbitration practice and there is no attempt to break it. As a matter of fact, there is hardly a trade or professional organization in England that does not provide some means for the arbitration of disputes that arise among members, and all contracts of employment in the trade agree to submit disputes to arbitration. The trades have found arbitration a more suiting remedy than the courts because it allows men with the technical knowledge of the trade to decide the facts of the controversy as court procedure has never found a way to do. In addition, the legal rights of the parties are guarded by the fact that either party to an arbitration may have questions of law submitted to a court for a ruling which is binding on the arbitrators.

In the United States, there is a growing tendency to introduce the English practice and many business men contract with the idea of submitting disputes to arbitration expressed in their agreements.²⁵ The difficulty is that, except where State laws have provided for the specific enforcement of such agreements, the common-law equity rule will not enforce

²⁴ Charles G. & Bertha M. Haines, *Principles and Problems of Government*, 426.

²⁵ See 34 *Yale Law Journal*, 480.

them specifically, but the only remedy is a damage suit for their breach. This is being met, however, by the passage of arbitration acts that make such agreements "valid, irrevocable, and enforceable," and the American Arbitration Society has published a model State Arbitration Act which it urges for adoption in the various States.²⁶ In 1920,²⁷ New York adopted an Act which made contracts to arbitrate specifically enforceable and introduced in general the possibility for following the English practice of commercial arbitration in that State. New Jersey, Massachusetts, Oregon, and California now have similar laws, along with the Federal Government (as applicable to trades under federal control).²⁸ The movement seems to be progressing rapidly and there appears to be no valid reason why merchants of full age and mental capacity should not be permitted by the law to make a contract stipulating for the adjustment of controversies between themselves by the arbitration of a fellow merchant, which contract will be specifically enforced.²⁹

Undoubtedly, voluntary arbitration is a desirable practice and should be encouraged. Both conciliation and arbitration form satisfactory ways of settling disputes, and while they have their limitations they could not fail to improve the processes of justice if added to our present system.

²⁶ Journal American Judicature Society, December 1926, X, 122, No. 4.

²⁷ Laws of New York, 1920, C. 275.

²⁸ The acts have been declared constitutional by the highest Court of New York and the Supreme Court of the United States. For a discussion of the acts and specific references to them see: 25 Columbia Law Review 822 and 11 American Bar Association Journal, 153; also, the Journal of the American Judicature Society for October 1925, and June 1927.

²⁹ No treatment of compulsory arbitration is given since the laws for compulsory arbitration in certain industries in Kansas have been declared unconstitutional by the U. S. Supreme Court, although there still seems to be possibility for its being held valid as to transportation and public utilities. See Edward Berman, "Supreme Court and Compulsory Arbitration," in the American Economic Review for March 1928.

CHAPTER VI

THE EXECUTIVE IN THE ADMINISTRATION OF JUSTICE

We have already had occasion to note the distinction between the part that the State plays in the administration of civil and criminal justice; in the former, merely providing the means whereby individuals acting on their own initiative may settle their disputes;¹ in the latter, not only establishing the tribunals, but assuming the affirmative duty of bringing criminals before the bar of justice. It is in the last mentioned function that the executive enters into the administration of justice most extensively, being responsible not only for bringing the criminals before the courts, but in taking charge of them after sentence is passed.

It is extremely important, therefore, to consider the agencies that are concerned in this work, since without action on their part the courts cannot function and one whole branch of the administration of justice fails.² These agencies are: the chief executive, the Department of Justice and the attorney general, the State's attorney, the police, the grand jury, the coroner, and penal institutions.

The chief executive, the governor, is theoretically the head of the agencies to see that the laws are faithfully executed.

¹ Mr. W. F. Willoughby, lecturing on judicial administration, made the very interesting suggestion that the state might just as well consider this an affirmative duty, to provide on its own part for the enforcement of private rights and the giving of relief for infractions thereof. In other words, instead of merely establishing means for the adjudication of controversies, it might take the initiative in bringing civil wrongs before the courts as it does in the case of crimes. Even without this, the extent to which the machinery established by the state for the adjudication of private disputes should be free presents an interesting question. See below, the chapter on General Judicial Reform.

² It is interesting to consider the extent to which this separation of functions is needless and whether more effective results might not be obtained by placing the responsibility for detecting crime and prosecuting it in the hands of the judicial branch. This centering of responsibility for locating and prosecuting violations of law along with determining the application of the law thereto is found in such bodies as the Federal Trade Commission, the Public Utilities Commission, and the like.

In fact, the Maryland Constitution, like that of the United States and most of the other States, expresses this in so many words: "He shall take care that the laws are faithfully executed."³ Although this general duty applies to the governor in his capacity to take care of State administration generally,⁴ it is equally applicable as a matter of theory to him as chief of the authorities for the administration of criminal justice. It is interesting to note, therefore, the extent of his control over such authorities, to see if it matches with the duty placed on him.

First, as regards the attorney general and the state's attorney, the control of the governor is shallow and depends almost entirely on their willingness to cooperate with him. They are elective officials, and as such are in no way responsible to the governor for their offices and are not likely to feel responsible to him otherwise. The attorney general is obligated by the Constitution to commence, prosecute, or defend any suit on the part of the State which the governor may direct, or to assist any State's attorney in the prosecution or defense of any suit at the direction of the governor,⁵ but the power of the governor to control the officer in such action is not great where he derives his authority to hold office from the same source as the governor. Practically the only influence that the governor can bring to bear on any such elective official is through the political party, and this influence may or may not be effective, according to the position of the governor in the party and the extent to which the party controls the election of the officer. In the event that the governor might

³ Maryland Constitution, Art. 2, Sec. 9.

⁴ We might observe that of recent years, under the administration of Governor Ritchie, the executive power in Maryland has been strong, and with the aid of the executive budget and the power of appointment and control of quite a few of the administrative agencies, the governor has been practical as well as theoretical head of the administration. We might say then that in the enforcement of "public law," the constitutional duty of seeing that the laws are faithfully executed has actually been shouldered by the government. This executive control and leadership has given in Maryland, as it usually gives, efficient administration.

⁵ Maryland Constitution, Art. 5, Sec. 3.

be of a different political faith, a disastrous lack of cooperation might result.

The form of organization giving the executive the control that ought to be a corollary to the responsibility which is theoretically centered in him is that which would allow him to appoint the chief of a Department of Justice, as in the Federal Government, who in turn would have power to appoint the necessary subordinates (district officers) subject to the approval of the chief executive.⁶ Maryland is not the only State that is at the opposite extreme from this centralized control. The attorney general is chosen at large by popular vote in more than forty States, while the district attorneys are chosen in the same manner.⁷ A more detailed consideration will be given this as each office is discussed.

As regards the police, which with the prosecuting officials complete the two great arms of the State for the detection of crime and the bringing of criminals before the court, the governor has a little greater control. He appoints the Police Commissioner for Baltimore City,⁸ who has complete administrative control of the city force, and also the Commissioner of Motor Vehicles,⁹ who has authority to appoint a force of twenty State police for the enforcement of traffic rules. This gives the governor a certain amount of control here, but otherwise the police function is left largely to each individual county and in many is maintained solely by the sheriff and constables.

The other powers of the governor in seeing that the laws are faithfully executed are found in the constitutional

⁶ Although the president in the federal system is the one who appoints the district attorneys as also the attorney general, such appointments are usually made on the latter officer's suggestion, amounting virtually to appointment by him.

⁷ See John M. Mathews, *American State Government*, 415 et seq., also, Walter F. Dodd, *State Government*, 237. In New Jersey, New Hampshire, and Pennsylvania the attorney general is appointed by the governor; in Maine he is chosen by a joint vote of the two houses; and in Tennessee he is selected by the judges of the Supreme Court.

⁸ Acts 1920, Ch. 559. Charter and Public Local Laws of Baltimore City, 1927, Ch. 740 et seq.

⁹ Bagby's Code 1924, Art. 56, Secs. 175, 176.

provisions that he may call out the militia to enforce the execution of the laws¹⁰ and that he may grant reprieves and pardons, except in cases of impeachment and other cases in which he is specifically prohibited so to do by the Constitution.¹¹ The latter power, however important it may be, is negative and not affirmative in its nature, while the former one is from its nature only to be used in cases of insurrection or violent outbreaks beyond the control of the ordinary agencies.

In summary, then, the governor of Maryland, as in most States, does not exercise the actual control of the process of seeing that the laws of the State are obeyed. It is left to a large extent in the hands of officials locally elected and controlled, the State's attorneys, and to some extent the attorney general.

Nor does this latter official possess the powers of direction and control that his name might imply or that a comparison to the similar federal office might lead one to believe. He is elected by the qualified voters of the State for a term of four years to hold office until his successor is elected and qualified, and is subject to removal for incompetency, willful neglect of duty or misdemeanor in office on conviction in a court of law.¹² The Constitution prescribes that he shall prosecute

¹⁰ Maryland Constitution, Art. 2, Sec. 8. In connection with a similar provision in the constitution of 1851, it was held in the case of *Baltimore v. State*, 15 Md. 486, that the portion of the Act of 1860, Ch. 7 commonly known as "The Baltimore Police Bill," providing that the board of police commissioners might call out the militia was not an improper interference with the governor's prerogative.

¹¹ *Ibid.*, Sec. 20. This section reads: "He shall have power to grant reprieves and pardons, except in cases of impeachment, and in cases in which he is prohibited by other articles of this constitution; and to remit fines and forfeitures for offenses against the state; but shall not remit the principal or interest of any debt due the state except in cases of fines and forfeitures; and before granting a 'nolle prosequi' or pardon, he shall give notice in one or more newspapers of the application made for it, and of the day on or after which his decision will be given; and in every case in which he exercises this power, he shall report to either branch of the legislature, whenever required, the petitions, recommendations and reasons which influence his decision."

¹² Maryland Constitution, Art. 5, Sec. 1.

and defend on the part of the State all cases in the Court of Appeals of Maryland, or in the Supreme Court of the United States; he shall give his opinion in writing whenever required by the General Assembly or either branch thereof, the governor, the comptroller of the treasury, or any State's attorney, on any legal matter or subject pending before them or either of them; and when required by the governor or General Assembly he shall aid any State's attorney in prosecuting any suit or action brought by the State in any court of the State, and he shall commence and prosecute or defend any suit or action in any of said courts, on the part of the State, which the General Assembly, or the governor, acting according to law, shall direct to be prosecuted or defended, and he shall have and perform such other duties and shall appoint such deputies or associates as the General Assembly may from time to time by law prescribe.¹³ Under this latter power the Legislature by the Act of 1916 as amended in 1918, established the Department of Law with the attorney general at its head,¹⁴ and today the attorney general's duties are performed entirely through this department and his work is mainly the supervision thereof. In addition to the duties assigned by the Constitution, these Acts provide that the attorney general shall have general charge, supervision, and direction of the legal business of the State and shall be legal advisor and representative of and perform all legal work of all officials of Baltimore City appointed by the governor and all boards, commissions, departments, offices or institutions of the State government,¹⁵ except the Public Service Com-

¹³ Ibid., Sec. 3.

¹⁴ Codified as Art. 32 A. of Bagby's Code of 1924.

¹⁵ The Act enumerates these commissions as follows: Board of Supervisors of Elections of Baltimore City, Board of Liquor License Commissioners of Baltimore City, Police Commissioner of Baltimore City, State Roads Commission, State Insurance Commissioner, State Tax Commission, State Industrial Accident Commission, Board of Shell Fish Commissioners (conservation commissioner should probably be substituted here), State Bank Commissioner, Commissioner of Motor Vehicles, State Board of Health, Sheriff of Baltimore City, and all other boards, commissions, departments, officers, or institutions, of the State Government (except as provided in section 10 which are the ones enumerated in the text).

mission of Maryland, the Boards of Supervision of Elections, the Boards of School Commissioners, and county boards or officers. In the performance of these duties, he may appoint four assistant attorneys general, who shall be practicing lawyers in good standing, to hold office at his pleasure at a salary of \$2,500 a year each. The attorney general receives a salary of \$5,000 and to be eligible for election must be a citizen of the State and must have resided and practiced law therein for at least ten years.

The organization of the Department of Law, while it was a marked step toward efficiency in providing a single directing agency for the legal advice of the various State boards and thereby stabilizing their policy, made no change whatever in the relationship of the attorney general to the enforcement of criminal law in the first instance. Under the constitutional provisions cited earlier, the attorney general (except as requested by the governor) only has power in criminal matters to take charge of cases on appeal, and he has no control over the prosecuting attorneys (State's attorneys) as such, nor in their work of instituting and prosecuting charges in the first instance. Each of these situations is equally undesirable. It is a needless duplication of effort to have a new attorney take charge of a case on appeal and in preparing his argument be forced to go over ground with which the State's attorney who tried the case in the first instance should be familiar. Even where there is a close cooperation between the State's attorney and the attorney general's office there must be wasted effort. It would be far more desirable to have the original prosecutor carry his case through to its conclusion in the Court of Appeals, with powers of supervision in the attorney general and the right in the prosecuting attorney to secure advice from him.

As regards the centralizing of control and responsibility for the State-wide administration of criminal justice in the Department of Law, students of State government agree that it is the only solution compatible with the theory that it is the prime function of the State to see that law is enforced

and obeyed.¹⁶ This can be secured, however, only by having the district prosecuting officers derive their authority from and be responsible to the State instead of their respective localities as they now are; or, at least by placing more direct powers of supervision and control in the hands of the attorney general. At present his only control exists in the power to have a State's attorney removed upon address of the General Assembly by a two-thirds vote.¹⁷ This method of control is calculated to meet only extreme cases of misconduct or breach of duty and does not give the attorney general any real authority in the ordinary supervision of the work. A glance at the annual reports made by him as head of the Department of Law¹⁸ will show that the chief work of the Department is in the exercise of its advisory duties to the various State organs, and any member of the department will state that they make no attempt to supervise the actual enforcement of the law in the first instance.

This responsibility is spread over the whole State in the hands of the various State's attorneys. The Constitution provides for the popular election of a State's attorney for each county and for the City of Baltimore to hold office for a term of four years, subject to removal therefrom for incompetency, willful neglect of duty or misdemeanor in office, on conviction in a court of law or by a vote of two-thirds of the Senate, on the recommendation of the attorney general.¹⁹ To be eligible for election to the office, a person must have been admitted to the practice of law, and have resided for at least two years in the city or county for which he is elected.²⁰ The State's attorney receives a salary of \$3,000 a year in the

¹⁶ See John M. Mathews, *American State Government*, Chap. XV, 413 et seq.; and *Principles of American State Administration*, Chaps. XV, XVI; also Walter F. Dodd, *State Government*, Chap. XI, 290.

¹⁷ See below, p. 141.

¹⁸ Annual Report and Official Opinions of the Attorney General of Maryland, published in a bound volume for each year since the establishment of the Department of Law, in accord with the requirements of the act of 1916. (Bagby's Code 1924, Art. 32 A, Sec. 8).

¹⁹ Maryland Constitution, Art. V, Sec. 7.

²⁰ *Ibid.*, Sec. 10.

counties, and \$7,500 in Baltimore City.²¹ In Baltimore City, the State's attorney has power to appoint a deputy State's attorney and such assistants as the Supreme Bench may authorize or approve, the deputy to receive a salary of \$5,000, and each assistant \$4,000 per year.²² In case of a vacancy in the office of State's attorney or his removal from the county or city in which he shall have been elected, or on his conviction as above described, the vacancy shall be filled for the residue of the term by the judge having criminal jurisdiction of the county or city where the vacancy occurs.²³

It is in the office of State's attorney, corresponding to the district attorney or prosecuting attorney of other jurisdictions, that we have the working unit for the enforcement of criminal law. Its importance is hard to exaggerate. Upon the State's attorney alone, in the great majority of cases, rests the power of determining whether prosecution in any given case shall be inaugurated, and if inaugurated, whether it shall be pushed to a successful conclusion. After the case is begun, the vigor and energy with which this all-powerful official presses it, seeks witnesses, and controls its course determines the result in practically all instances. He may allow the case to drag, ask for a continuance, or kill it altogether by asking for a "nolle pros," which is invariably granted by the court. Then, many times the opinion of the prosecuting attorney has considerable weight in determining the judge's sentence after the case is brought to a conclusion.

It is inevitable and desirable that these broad powers should rest in the prosecuting attorney or some similar officer. Discretion must be vested in someone as to the inauguration and prosecution of suits. The question that arises, however, and that is pressed by students of State government, is the extent to which the enforcement of State policy should be left in the hands of local officials, such as the State's attor-

²¹ *Ibid.*, Sec. 9.

²² *Ibid.*, as amended by Acts of 1924, Ch. 177. The present staff in Baltimore City consists of a deputy state's attorney, six assistant state's attorneys, a law assistant, and a chief clerk.

²³ *Ibid.*, Sec. 11.

neys are, with such little provision for supervision and control. Writers come to the unanimous conclusion that the office as organized is on a most unsatisfactory basis and subject to attack in almost all of its features.

Practically all of the theoretical defects are to be found in Maryland. The officials are locally elected, although they are responsible, almost solely, for the execution of State law. They are not subject to any supervision or control in the exercise of their duties except in glaring instances of misconduct. No provision is made for a uniform system of keeping their records or, in fact, for the keeping of records at all and no reports are required of the work done.

Despite all this, an analysis of the present conditions in Maryland shows that law and order are rather effectively preserved and that there are no complaints as to the functioning of the prosecuting agencies, even from such an observant critic as the Baltimore Criminal Justice Commission.²⁴ These satisfactory results from a system that is theoretically bad may be explained in several ways. In the first place, Maryland is a small State with few densely populated areas except Baltimore, whereas density of population with complex living conditions is one of the chief breeders of crime. Secondly, Baltimore City for some time has been under the administration of very capable prosecuting officers. The present State's attorney has developed an enviable record and has on his own initiative begun some of the practices which the law might well require. The outstanding one is that of keeping an accurate record of all business done by the office and publishing an annual report. Undoubtedly this administration has set a high standard of efficiency and its records will be instrumental in keeping future administrations

²⁴ This Commission was organized late in 1922 under suggestion of a committee of the Baltimore Board of Trade. Although it is privately sponsored and supported largely from the Community Fund (private gifts) and the business interests of the city, its influence in Baltimore City is undoubtedly great in keeping all organs for the detection and prosecution of crime up to a high level of efficiency, because the members of the Commission realize that their work is being observed and studied.

up to the same level. They will find it hard to depart from the practices that have brought good results without creating popular disfavor. Thirdly, in the counties because of the closer interest, typical of rural communities, that each person is likely to have in any turmoil of any consequence, the State's attorney is under a close popular check in the prosecution of major offenses.²⁵ And lastly, just as Maryland does not have the complex living conditions that tend to breed criminals, it does not have the rich interests that tend to attract criminals of the professional type.

Therefore, our moderate success in preserving an orderly obedience of the law should not cause us to push aside all considerations that suggest that our system might be improved. Undoubtedly a provision for the keeping of uniform records by the State's attorneys would be an improvement, as also the requirement of an annual report such as started in precedent in Baltimore City by Mr. Herbert R. O'Connor.

By far the most interesting suggestion by way of complete reform of the district attorney's office in the States, and one that seems most meritorious from the point of view of centralizing control so as to secure the greatest efficiency and economy, is that first brought to the writer's attention by Mr. W. F. Willoughby.²⁶ In addition to providing for the keeping of proper records, and the control of the office by a State Department of Law, he feels that for the best results it should be provided that the State's attorney or corresponding officer should have entire direction of and responsibility for all administrative agencies having as their function the enforcement of the law. The effect would be to have the police, the coroner (or medical examiner who should take his place), and all similar agencies concerned in the enforcement of law under the supervision and control of the State's attorney, who would be a local minister of Justice. Mr. Wil-

²⁵ This of course does not prevent the possibility of many minor abuses of power nor the presence of political control in many instances.

²⁶ In his lectures on Judicial Administration at the Johns Hopkins University, 1925-1926.

loughby's description, in addition to accurately setting forth this proposal, gives such an excellent summary of the whole situation that an extended quotation from him is justified: ²⁷

Viewing the problem from this standpoint it would appear that the same action that has been recommended in reference to the conversion of the office of attorney general into a Department of Justice to the end that there shall be one officer having general responsibility for seeing that the laws are duly enforced should be taken in reference to the Office of District Attorney. To state this in another way, in each municipality or other political subdivision, the district attorney or other corresponding officer should have entire responsibility for and complete direction of all administrative agencies having for their function the enforcement of law. He should be the minister of justice for that jurisdiction. The argument in favor of this action has been excellently stated by Mr. Alfred Bettman who was in charge of the Division of Prosecutions in the Cleveland Survey of 1921, in an address before the St. Louis Bar Association, March 30, 1925. He said: ²⁸

'The main trouble is that the apparatus with which, in our urban and metropolitan communities, we attempt to prosecute crime is hopelessly uncoördinated and disjointed; that too often the prosecuting or district attorney (or Circuit Attorney as he is called in St. Louis) is simply one part of this disjointed, uncoördinated apparatus, instead of being the chief executive and director general of a systematized and coördinated prosecution of crime in his community. . . The ultimate success in the trial of a case turns generally upon the detection and presentation of evidence while that evidence is fresh. As a rule, however, the prosecuting attorney whose office will ultimately try the case has no systematic contacts with the police or other detecting departments previous to the time when the case reaches his office for presentation to the grand jury or for trial; and often, as in Cleveland, the police department is a city department and the prosecuting attorney is a county official and they are wholly independent of each other, or, if the county attorney be given a detective division, it is an extremely inadequate one. In other words, the processes of preparation of the proof, and the processes of trying the case are so poorly coördinated that it is largely a matter of luck whether the evidence, when the time comes for trial has been well ascertained and well prepared.'

In another place in his address he says: 'His (the Prosecuting Attorney's) should be the position of chief administrator of criminal justice in his community. He should bear the same relationship to his community, to local and state criminal law, that the Attorney General of the United States bears in the nation to the federal criminal law. He should be the local minister of criminal justice in whom is concentrated the executive direction of dealing with crime so far as prosecuting agencies deal with crime, as well as the leader

²⁷ Manuscript on Judicial Administration: Chapter on the Office of District Attorney.

²⁸ Reproduced in Journal of the American Bar Association 1925, X, 455.

of the community in dealing with the problem of crime prevention through law enforcement. . . .

'The prosecutor should be a student of the causes of crime in the community, an investigator, an analyst. He should treat his office as one of the social agencies of the city engaged in the treatment or suppression of those situations and conditions which are themselves violations of law and which create the breeding places of the grave crimes. Systematic coördination with the other social agencies of the city, particularly with those which come into contact with crime producing environments should, therefore, be a part of the organization of the prosecutors' activities.'

Much the most important change that would be effected in existing organization by making the District Attorney a local minister of justice would be the placing under his direction of the police. In considering this feature it should be borne in mind that the new office of the district attorney would be radically different from his old one. It would be a department, corresponding to the other departments of the local government, embracing a number of bureaus or services of which the police and the old office of prosecutions would be two of the more important, each with its responsible chief. The head of the department itself would be primarily an administrator whose most important duty would be that of seeing that all the units under his direction were working in harmony and close coöperation. It would be more desirable that such an officer would be a specialist in penology using that term in its broadest connection as covering all that has to do with the detection of crime, the psychology of the criminal, the causes of crime, the treatment of offenders, etc., than that he should be merely learned in the law.

In harmony with this proposal are the two proposals elsewhere made that the grand jury be abolished as an agency for general use in the prosecution of crime and that proceedings be inaugurated through information on the part of the district attorney, and that the office of medical examiner as a subordinate agency of the district attorney's office be created in substitution for the existing office of coroner.

The creation of a department of law enforcement of this kind would mean that there would be one man to whom the public would look for the enforcement of the law and this man would have at his command all the agencies of the government through which to meet this responsibility. Until this action is taken it is impossible to secure a system for the enforcement of law that will be entirely satisfactory.

This suggestion of Mr. Willoughby's presents a sweeping reform, but one which from the standpoint of administration is sound. Although it is not included in the suggestion, such a minister of justice might well have under his supervision all probation work, as well as the administration of the local penal institutions. Since he would be a "student of penology in the broad use of the term," he would be most competent to handle offenders even after sentence. The presentation of

this reform, however, has carried us beyond our description of the executive agencies entering into the administration of criminal justice, and the quotation from Mr. Willoughby has suggested two reforms which we have yet to consider.

We must agree with him that the coroner and the grand jury as used are no longer justifiable parts of our system. With the burden of discovering and prosecuting crime resting primarily upon the State's attorney and the police, there is no justification for having a further division of responsibility by having a coroner and his jury of twelve investigate all cases of violent death. The burdens of the office²⁹ require that the incumbent be not only a medical specialist, but that he be thoroughly familiar with legal principles and procedure. That both are to be found in the same man is extremely doubtful, although the Maryland system of having the coroners appointed is more likely to produce competent officials than the plan of popular election that exists elsewhere.³⁰ But assuming that the coroner is competent to fill the office, it is needless to have the investigation in the control of a separate organ and one as unwieldy as the ordinary coroner's jury of twelve, especially when no prosecution may result therefrom without indictment by the grand jury. It would be far more satisfactory to abolish the office, have a competent medical examiner appointed with powers to call in one or two witnesses, to take charge of whatever autopsies are necessary for the purpose of detecting crime, and to make a thorough report to the state's attorney under whose control he would act. If the state's attorney were a local minister of justice, the medical examiner would be a part of his office, possibly appointed by him.

Massachusetts and Maine both provide for the appointment by the governor of medical examiners in each county, and in New York City since 1915 the coroner has been

²⁹ For the duties of the office as it exists in Maryland, see above, p. 49.

³⁰ This at least assures the selection of someone trained in medicine, and with a sufficient cooperation between the coroner and state's attorney, it can produce very desirable results.

replaced by a chief medical examiner.³¹ In concluding his remarks on the subject, Mr. Walter F. Dodd says:

The office is one that may well be abolished, in the interest of a more efficient administration of justice.³²

In the grand jury we find an organ probably with a greater popular hold than the office of coroner and yet with little more justification for its existence under modern conditions. Like the office of coroner, it appeared in the early stages of the development of English law before the modern system of having a prosecuting attorney and police responsible for the detection and prosecution of crime was known.³³ But it has remained a part of the system as a bulwark for the protection of individual liberty and safety from unjustifiable prosecution. That it no longer serves a useful purpose either as an organ of the State for the detection of crime in most cases or as a safeguard against prosecution is the opinion of Mr. W. F. Willoughby after a careful study of the situation throughout the United States. A brief survey of the actions of the grand jury in Maryland will show that his conclusions are applicable here and that the use of this organ might well be limited, if not abolished.

At the beginning of each term of court a panel of forty-

³¹ Walter F. Dodd, *State Government*, 317.

³² In our discussion of the coroner here, no mention has been made of the duties he has as substitute for the sheriff. These duties, however, are not important enough to justify his retention as a part of our system, and, if anything, are a bit incongruous as grouped with the other functions of the office.

³³ It is generally traced to the adoption by Henry II (1154-1158), as a feature of strengthening his control over judicial administration, of the procedure known as the "inquest" which had been employed by his predecessors and the church in securing information generally to discover crime and those responsible for it. At first this consisted of the entire body of the freeholders of the country who were to make known what crimes had been committed and the persons suspected of such crime. Later this duty of making known and accusing persons suspected of crime was placed on a select body of citizens to represent the community. This body came to be known as the grand jury and was composed of from twelve to twenty-three persons whose duty it was to accuse under oath those persons whom they believed to be guilty of crime or at least to whose guilt there was sufficient evidence to warrant their arrest and trial. This system has continued in principle and essential character until today in Maryland.

eight jurors is drawn by lot from the jury list and from this panel of forty-eight the court selects and appoints one to serve as foreman of the grand jury.³⁴ After the foreman is selected, twenty-two names are drawn by chance and these men with the foreman constitute the grand jury for that term.³⁵ This body of men is summoned before the court and instructed by the judge in the nature and scope of their duties and administered the oath of office. They may at any time thereafter appeal to the court for further instructions, but this is seldom done. Immediately the grand jury is organized, the state's attorney (or an assistant especially charged with the duty) visits them and explains their duties somewhat more in detail than the court has done in its charge. The grand jury is now ready for work.

While there is no constitutional provision in Maryland requiring the use of the grand jury,³⁶ no provision has been made generally for the prosecution of criminal suits in any other way and it has been held that the state's attorneys have no power to act except as provided by statute or the constitution.³⁷ In Baltimore City all criminal prosecutions, except those before police magistrates and their appeals, are begun by a grand jury indictment. Local laws for some of the counties allow prosecutions for misdemeanors to be begun on information of the state's attorney.³⁸ It would seem that at least this should be made a general state law but there is no movement for it as yet.

Although the power still exists for the grand jury to begin investigations, it is seldom used, and the chief work consists in the hearing of charges presented against various persons by the state's attorney. Only witnesses for the state are

³⁴ Bagby's Code 1924, Art. 51, Sec. 10.

³⁵ The remaining names of the forty-eight constitute the background from which to select the petit jury panel.

³⁶ Declaration of Rights, Arts. 5, 21; Maryland Constitution, Art. 15, Sec. 5.

³⁷ *Hawkins v. State*, 81 Md. 310.

³⁸ These laws were passed mainly because the grand jury was not always in session in the counties and not because of anticipation of the more efficient method of prosecution by information.

heard and only as many of these as the grand jury feels are necessary to satisfy them that there is sufficient evidence to justify an accusation of guilt. Usually a bill of indictment has been drawn up against the accused before his case is presented to the grand jury, and this bill is marked a true bill by the foreman upon a majority vote of the jury. It is seldom that they fail to true bill an indictment offered by the state's attorney if he does not indicate uncertainty by his actions before them.

The result is that in many cases the grand jury is nothing more than a rubber stamp for the opinions of the state's attorney and, as such, a useless complication and instrument of delay as far as the interests of the state are concerned. It is an expense to the government and an inconvenience to the persons who must serve on it. Its theoretical protection of individual rights in practice amounts to nothing where it does little more than follow the lead of the prosecutor. In addition, the accused is denied the right to be heard in person and no witnesses on his behalf are allowed.

While, then, the grand jury might be worth while as an instrument to meet occasional emergencies³⁹ in the administration of criminal justice, its retention is no longer justified as the ordinary instrument for the beginning of a prosecution. Information by the state's attorney should be allowed and used as the usual method.⁴⁰ This plan seems to have worked well in States that have practically discontinued the use of grand juries. Michigan is the outstanding example. No grand juries are impaneled except upon order of the Circuit Court. This order is seldom

³⁹ Such as flagrant cases of law violation where the state's attorney hesitates or refuses to act. It might also be well to require its retention, as in some States, in all cases where the death sentence or life imprisonment is the penalty.

⁴⁰ In the case of *Hurtado v. California*, 110 U. S. 516, the Supreme Court of the United States held that provision for prosecution by information in the constitution of California did not violate any requirements of due process of law as required by the fourteenth amendment of the United States Constitution.

called for and the system has worked successfully for a number of years.⁴¹

The practice throughout the States of the Union varies considerably, but the use of the grand jury is being reduced considerably, and many variations from its usual form may be noted. In Colorado, Kentucky, Louisiana, Missouri, Oklahoma, and Texas the number of grand jurors is twelve and nine may indict. In Montana, Oregon, and Utah, the number is seven and five may indict. These provisions are included in the constitutions of said states and indicate a tendency to reduce the size of the body. The constitutions of Arizona, California, Idaho, Missouri, Montana, Nevada, Oklahoma, South Dakota, Utah, and Washington provide that cases may be prosecuted by information as well as indictment, and some other states allow this by statute when there are no constitutional restrictions.⁴² The general trend is, as said above, to limit and improve the use of this venerable but now unwieldy organ of the prosecution.⁴³

At this point the question may well be raised as to the extent to which the state should consider itself responsible for the defence of persons accused of crime. It must be remembered that innocent persons are frequently accused of crime, and that even guilty persons should be given a protection against being charged with more than their offense justifies.

At present the only provisions in the State of Maryland are that the courts may appoint counsel to defend any person in any criminal trial whenever in their judgment it is necessary for a just regard of the rights of the accused and that the county commissioners of the several counties

⁴¹ Journal of the American Judicature Society: The Success of Michigan's One Man Grand Jury Act, IX, 11, No. 1; also Michigan's One Man Grand Jury, by Judge Pliny W. Marsh in VIII, No. 4.

⁴² For a more complete analysis of the situation in each state and upon the whole matter of grand juries see, Illinois Constitutional Convention Bulletin, No. 10, on "The Judicial Department, Jury, Grand Jury, and Claims against the State," 828-836.

⁴³ See Dodd's, State Government, 311-314; also, Journal of the American Judicature Society, Grand Jury Reform, IV, 77, No. 3; also, Information or Indictments in Felony cases by Professor R. Justin Miller, VIII, 104, No. 4.

and the mayor and the City Council of Baltimore shall levy and pay for the services rendered by any person appointed by the court to assist in the defense of any case, provided the amount paid for services in any one case shall not exceed one hundred dollars; and provided that in no case tried in any Criminal Court of the City of Baltimore shall any attorney be entitled to demand or receive such fees for defending a case except when they are taxed against and paid by the accused as part of the costs of the case.⁴⁴ The effect of these provisions is that counsel is assigned only in major cases, that when assigned it is at poor pay in the counties and very often with no pay in Baltimore City, and that very often the defendant's rights are severely prejudiced if he is unable to provide counsel of his own.

This situation has been met in several States by providing for a public defender paid by the State to act as an agent of the State in defending all persons accused of crime. As most efficiently working, the public defender should occupy a position similar to that of the State's attorney and should work in harmony with this official. He should have a right to participate in looking into the defense in all cases, although the accused should not be deprived of his right to have his private counsel. He should have at his service the agencies of the government, such as the police, detectives, and medical examiners for the purposes of investigation. And lastly, he should take it as his duty to look out primarily for the interests of the State, to get the accused cleared if innocent and to plead guilty if he has no defense.

The chief advantages of such an office may be enumerated as follows:

1. Every person charged with crime would be represented by an attorney who would be interested in the welfare of the State as well as the accused.
2. There would be a thorough investigation of every case before trial.

⁴⁴ Bagby's Code 1924, Art. 26, Secs. 7 and 8.

3. Convictions of innocent persons would be reduced to a minimum.

4. Constitutional and legal safeguards guaranteed to the accused would be better protected.

5. The defender would present the full facts, and show all mitigating circumstances.

6. The Courts would be relieved of work because of the increased pleas of guilty where justified by the facts, and the stopping of cases before trial by *nolle pros* when a close coöperation between the State's attorney and public defender would exist.

7. Lawyers of a low grade who prey on unfortunate prisoners would be eliminated.

8. Cases would be more speedily brought to trial and more speedily and properly tried.

9. A higher respect for law and order would be maintained.⁴⁵

These enumerated advantages are not exaggerations, and the creation and maintenance of such an office as that of public defender is to be urged as part of any thoroughly efficient and fair system of administering criminal justice. State-wide laws providing for public defenders now exist in California, Connecticut, Minnesota, and Nebraska, and also in Virginia for cities over 100,000 population, although in the latter State no provision as to salary has been made and hence no public defender offices established.⁴⁶

In Maryland, the situation as to the providing for the defense of persons accused of crime and unable to secure counsel may well be improved. The provision for public defenders would clearly be the most desirable remedy. Failing that, the system of appointing counsel should be organized so that there is a list of competent attorneys kept by the

⁴⁵ See the article by Samuel Rubin in the *Journal of Criminal Law and Criminology* for November 1927, p. 346, "The Public Defender an Aid to Criminal Justice;" also in the same journal for February 1928, p. 522, "The Public Defender in Connecticut," by Robert G. DeForest.

⁴⁶ *Ibid.*

judges for such work and adequate pay given them. The provision for public defenders would be more efficient and equally as economical.⁴⁷

Thus far our discussion has concerned itself chiefly with those agencies that have to do with the handling of crime once it is detected and the offender apprehended. While they are of chief interest in that they are most closely connected with the Courts, it is not going beyond the purposes of our study to consider briefly the agency maintained by the government for the direct prevention of law violation and the immediate apprehension of law violators—the police. Because of the early theory of English law that the prevention of crime was not a direct function of the state and that the duty rested with each individual to protect his own interests by seeing that criminals be brought before the bars of justice, direct police protection is of rather recent development.⁴⁸ The principle, once started, has grown rapidly, and under the pressure of modern civilization each city is patrolled by a regular police force and many American States have provided for similar permanent forces operating throughout the whole area of their control.⁴⁹

In Maryland we find the police functions vested in the police system for Baltimore City, the State police appointed under the Motor Vehicles Law, police systems for incorporated towns other than Baltimore⁵⁰ and the local sheriffs

⁴⁷ Mr. Reginal Heber Smith's *Justice and the Poor*, 105, gives a thorough treatment of the public defender and his possibilities.

⁴⁸ The first police force to be established in England was the Metropolitan Police Force for London, established in 1829, by Sir Robert Peel, from which origin came the term still applied to police officers in England and to a limited extent in this country of "Bobbies" or "Peelers." In this country the development was by way of first "night watches," then "day and night watches" (law of Boston in 1838; providing for six men to render this service) and finally the modern police force (law of New York in 1844, one of the first to provide for this on a comprehensive scale).

⁴⁹ Bruce Smith, *The State Police*.

⁵⁰ These are regulated by the various local charters and in general the state has left the matter to local control. No attempt is made to work out each system, as our study is more for the purpose of seeing the extent to which the state should enter in providing a state-

and constables. For Baltimore City⁵¹ there is appointed by the governor a Police Commissioner who has complete charge of the force there. The Police Commissioner must have been a resident of or engaged in business in Baltimore City for three years prior to his appointment. He is appointed for a term of six years and receives a salary of \$10,000 a year. He appoints all members of the police and detective forces of Baltimore City and has charge of all promotions. This is probably the most efficient form of police administration known to American cities since it provides a centralized control and responsibility in one authority as well as recognizes the governor's position as chief of the law enforcing agencies of the state by empowering him to appoint that authority.⁵²

The police force of Baltimore City consists of the uniformed police for the patrolling of the streets by day and by night and of a detective force of seventy-eight men. Since the establishment of the present system, and in fact since 1900 under the board system of administration, the record of the Baltimore Police Department has been exceptionally good and not clouded with the corruption that has tainted the forces of some other cities. That the work has been efficient is testified to by the fact that for the year 1927,

wide police. The plan of police as existing in Baltimore City works well for municipal purposes.

⁵¹ See Charter and Public Local Laws of Baltimore City, 1927, Ch. 740 et seq.

⁵² For a good study of the American police systems see Raymond B. Fosdick, *American Police Systems*. The Baltimore Police System has gone through an interesting evolution before reaching its present state. As early as 1775, the male citizens of the town banded together and bound themselves to maintain in rotation an organized night watch. In 1784, the legislature authorized the County Commissioners (under whose control the town of Baltimore was placed) to employ and hire as many watchmen as they should judge necessary and pay them for their duties. From then on the police force was gradually developed under various laws, until in 1860 the police force was organized under a board created by the legislature. This lasted until 1900 when the system was changed and the board was made appointive by the governor and finally (1920) the present system of a single commissioner appointed by the governor was established. Clinton McCabe's *History of the Baltimore Police Department, 1774-1907*.

the Baltimore Police Force was awarded the distinction by the National Crimes Commission of having the best record of any force in the United States for efficiency in the number of arrests for the number of crimes committed.

The efficiency of the Baltimore system may well be attributed to the strongly centralized organization of the force with a competent head secured by appointment by the governor.

The state police of Maryland are appointed by the Commissioner of Motor Vehicles who is appointed by the governor and they have, as established, no other authority than to take charge of violations of the Motor Vehicles Law.⁵³ There are twenty such officials equipped with motor-cycles and assigned by the Commissioner to various parts of the state but it is erroneous to consider them as state police in the real sense of the word because of their limited jurisdiction. The practice has developed of having them deputized by the local sheriffs, so that they may arrest for any offense, and this is a desirable practice. However, in some counties the sheriffs have refused to so deputize the motor-police and to the extent that this gives a decided lack of uniformity, the existing state of affairs is undesirable.⁵⁴

Outside of this special force provided for to enforce traffic laws, the policing of the counties is left entirely in the hands of the localities and the state assumes no responsibility for it. The sheriff, in his duty as chief peace officer with such deputies as he may appoint, the constables, and such police as may be locally established by the county commissioners, are responsible for the maintenance of order in the rural sections. That this system is inadequate under modern con-

⁵³ Bagby's Code 1924, Art. 56, Sec. 176.

⁵⁴ An attempt was made by the Commissioner of Motor Vehicles to have the power to make arrests in all cases of violation of law conferred on his special police but it was defeated mainly by the action of the labor interests in the State. In accord with a suggestion made later in the text it would be desirable to have a State Police organized as such which would include the already established motor police.

ditions has been recognized in several jurisdictions in the United States, and Maryland might well provide for a state police for the enforcement of all law similar to the organization that she now has for the enforcement of the Motor Vehicles Law.

Modeling on, or at least influenced by, the Royal Canadian Mounted Police, who with a comparatively small force have been successful in giving protection to a large area, some seven American states now have state rural police systems. In 1865 Massachusetts provided for a small number of state constables, and in 1879, she organized the Massachusetts District Police. Connecticut established a small force in 1903. Also in 1905, Pennsylvania established its State Constabulary which is one of the most effective organizations of its kind and demonstrates the value of such a service. New York in 1917, Michigan and West Virginia in 1919, and New Jersey in 1921 created organizations modeled generally on that of Pennsylvania.⁵⁵ The Texas Rangers organized chiefly as a border patrol have been in existence since the admission of the State to the Union and have performed police work since 1909.

Mr. W. F. Willoughby says of this movement:

There can be little doubt that this movement for the creation of state constabularies for the policing of areas outside of the cities having their individual police forces will continue and one can easily foresee the time when throughout the United States there will be in existence a dual police system composed of local municipal police and state rural constabulary.⁵⁶

Whether this prediction will be fulfilled or not remains to be seen, but the value of a state police force has been proved and there is no reason why the adoption of a system so eminently successful should not be urged for Maryland.

The last function of the executive in the administration of justice is to take charge of the punishment of offenders after

⁵⁵ The Arizona Rangers, created in 1901; the New Mexico Mounted Police created in 1905; and the Colorado Rangers, created in 1917 have all been abolished.

⁵⁶ Manuscript—Lectures on Judicial Administration.

they have been sentenced by the courts. This consists of the execution of death penalties, the maintenance of institutions for those sentenced to prison, which institutions may be distinguished as to whether they are for the keeping of long-time prisoners or for the keeping of those with a short sentence with the purpose of exerting a corrective influence. The execution of the death penalty rests with the sheriff who, upon a time set by the governor, sees that the court's orders are carried out. The maintenance of prisons and corrective institutions presents a greater problem, in fact one which would involve such a complete study of its own that we purpose to do little more here than to point out the institutions that exist in Maryland and their organization.

The penal institutions of Maryland may be classified as the county jails, the Maryland House of Correction, and the Maryland Penitentiary.

The county jails are used for the confinement of persons convicted of minor offenses within the county, for the detention of persons awaiting trial, and of material witnesses. There is one jail at the county seat of each county and one in Baltimore City. They are controlled by the County Commissioners of the several counties and by the Jail Board of the City. Although not embraced within the Department of Welfare (which controls all state penal institutions) they are annually inspected by the Director of that department, and their condition reported on yearly in the Annual Report of the Board of Welfare.⁵⁷

The Board of Welfare reported in 1926 that the sentiment is growing (and that on the basis of sound reasoning), that all persons sentenced by the courts for confinement should be sent to one of the state institutions.⁵⁸ This would at least assure the possibility of a uniform treatment and the opportunity for a more carefully planned treatment because of the centralization of all such work in the hands of a state agency

⁵⁷ Required by Acts 1924, Ch. 362.

⁵⁸ Annual Report of the Board of Welfare for 1926, p. 6.

that could be more properly financed to meet the needs of the situation.

The Maryland Penitentiary and the House of Correction are now maintained as part of a Department of Welfare.⁵⁹ The Director of the Department of Welfare, appointed by the governor, with the advice and consent of the Senate, for a term of four years at a salary of \$4,000 a year is almost solely responsible for the proper maintenance of these institutions.⁶⁰ He is supported by a board of six members, at least one of whom shall be a woman, who are likewise appointed by the governor but who receive no salaries. They serve for six-year terms, two members going out of office every two years.⁶¹ This system, while it gives an effective administrative supervision, has a paid director (it might well be said poorly paid) who as such must do most of the work of the board but whose opinions can be out-weighted by the numerical majority of the unpaid members. So far, however, the plan seems to be giving good results.

The Maryland House of Correction, established in 1874,⁶² has as its function the punishment, correction, and reform of persons convicted of misdemeanors and sentenced to short terms. It is under the direction and supervision of a Warden appointed by the Board of Welfare at a salary of \$3600 a year. About a thousand acres of land near Jessup in Anne Arundel County are dedicated to its use, and some five hundred and fifty acres are under cultivation. So far as it is possible the prisoners are kept busy on the farm, on the State roads, and on industries which are maintained by contractors under supervision. During the year ending September 30, 1925,

⁵⁹ Organized by Acts 1922, Ch. 29. This Act grouped as parts of one department: The Commissions and Board of Mental Hygiene, The Spring Grove State Hospital, The Springfield State Hospital, The Eastern Shore State Hospital, The Crownsville State Hospital, The Rosewood State Training School, and the above penal institutions. The Board of Welfare replaced the former State Board of Prison Control in its care for the latter.

⁶⁰ Ibid. Codified in Bagby's Code 1924 as Art. 27, Sec. 661.

⁶¹ Ibid.

⁶² Acts 1874, Ch. 233.

the prisoners earned for the state \$106,349.85 and for themselves \$40,906.12.⁶³ Too much emphasis cannot be placed on the importance of an institution such as this in determining whether a prisoner shall be reformed or made into a hardened criminal.

The Maryland Penitentiary is located in Baltimore City and the State owns for its use some six acres of ground, most of which space is covered by the buildings, except an open space of 150 x 150 ft. used as an out-of-doors recreation center. At present the Penitentiary is crowded to its utmost capacity,⁶⁴ there being some two hundred prisoners more than there are cells, who are quartered in dormitories improvised by the warden from rooms intended for other purposes. Some steps will need to be taken to remedy this over-crowded condition. The Board of Welfare suggests the purchase of a site and the establishment of a new State Penitentiary in the country eventually taking the place of the old institution altogether. This is probably the most desirable plan since sooner or later the old site will have to be abandoned or else the State Penitentiary divided between two locations.

The institution is under the direct supervision of a warden similar to that of the House of Correction and the inmates are kept at work daily in the shops which are within the grounds. During the year ending September 30, 1925, they earned the sum of \$273,297.20 for the State and \$224,023.65 for themselves.

In connection with the penal institutions, it should be mentioned that the State maintains or helps to maintain special institutions for the special care of minors committed thereto by police magistrates, justices of the peace, the juvenile courts, or the other courts. The chief institutions are the House of Good Shepherd, the House of Good Shepherd for Colored Girls, the House of Reformation, Maryland Training School for Boys, Montrose School for Girls, the Maryland

⁶³ Annual Report Board of Welfare, 1926, p. 7.

⁶⁴ Ibid, p. 14.

Training School for Girls, The Industrial Home for Colored Girls, and the St. Mary's Industrial School for Boys.

The proper maintenance of these institutions, along with the penal institutions as mentioned above, presents an interesting field for separate study; undoubtedly the State owes a duty to see that they carry out their purpose as efficiently as possible.

Notice has been taken earlier of the governor's constitutional power to grant reprieves and pardons. In connection therewith, the statute law provides that the governor with the consent of the Senate shall appoint a parole commissioner, not to be less than thirty years of age and a resident and qualified voter of the State for at least four years prior to his appointment, to hold office for a term of two years.⁶⁵ It is the duty of the commissioner to investigate all applications for pardon and parole and report the result to the governor. He must take under his supervision for such time as the governor may direct the inmates of any penal institution of the State who may be paroled by the governor, and keep records showing the actions, earnings, etc. of the said paroled prisoners during that time, reporting at once to the governor the violation of any of the terms of their parole. He may appoint parole officers (not more than four as provided for in the budget)⁶⁶ to assist him in the work and also a secretary to keep records. In pursuing investigations he has power to summon witnesses and examine them on their oath when necessary. He has visitatorial powers over every institution to which prisoners, whether adult or minors, are committed, that receives aid from the State, City or private sources.

The supervision of this work by a parole commissioner gives a specific way of controlling it without relieving the governor of ultimate responsibility therefor, and it seems to give satisfactory results.

To be distinguished from the question of parole administration is that of probation. This latter involves the suspension

⁶⁵ Acts 1922, ch. 29.

⁶⁶ In 1927 there were two such parole officers appointed.

of sentence in certain cases where there are mitigating features and the giving to the prisoner a supervised freedom, subject to be withdrawn and a sentence imposed upon a breach of good conduct on his part. This function is exercised by the judges and is not an executive one at all, but a brief discussion may be given to it.

The first law permitting probation for adults in Maryland was enacted in 1894 and provided that a person convicted of "larceny, false pretense, or any other offences not capital" who had no previous conviction against him, might, "regard being had to the youth, character and antecedents of the offender, to the nature of the offense and to any extenuating circumstances under which the offense was committed . . . be released on probation . . . during such period as the Court may direct."⁶⁷

Laws of 1902 and 1904⁶⁸ have amended this so that the final result is practically a suspended sentence law reading as follows: "The courts may suspend sentence generally or for a definite time and may make such orders and impose such terms as to costs, recognizance for appearance, or matters relating to the residence or conduct of the convicts as may be deemed proper; and if the convict is a minor, the courts may also make such orders as to his detention in any case or custody as may be deemed proper." Separate later laws set definite periods of probation for specific offenses, viz., nonsupport, bastardy, and desertion.

Neither in the later law nor its amendments is any provision made for the appointment of probation officers to supervise the convicts placed on probation. The appointment of such officers is made possible by the clause in the constitution which says:⁶⁹ "The judge or judges of any court may appoint such officers for their respective courts as may be necessary and such officers of the courts in the City of Baltimore shall be

⁶⁷ Acts 1894, ch. 402.

⁶⁸ Acts 1902, ch. 494. Acts 1904, ch. 461.

⁶⁹ Art. IV, Sec. 9.

appointed by the Judges of the Supreme Bench of Baltimore City."

Under these provisions the present probation system is established. In the counties there is usually no need for special probation officers, and persons put on probation, which is rarer than in the city, are placed under the supervision of an officer especially appointed for that one person by the court. There are salaried probation officers for some courts, though, when the need for them has impelled the county to appropriate money for the work. In Baltimore City, the question is more important and the work could not be carried on without special officers to administer it. Accordingly there are at present seven probation officers with clerical assistants appointed by the Supreme Bench and paid from an appropriation of \$22,000 made by the Mayor and City Council.

This system is far from doing efficient work, and studies made by the Baltimore Criminal Justice Commission ⁷⁰ reveal that it is practically worse than having no probation at all. The Supreme Bench has realized the insufficiency of the present method and after a careful study of the situation has asked for the appropriation of more money (which has been twice refused by the City) so that it may provide for a complete reorganization of the work. Undoubtedly the work of probation is important and should be carried on, but in an effective manner. It seems that the State upon whom the duty of administering justice properly rests should take the matter in hand and make an appropriation for the establishment of a probation department in Baltimore City to meet the needs which are present there.

⁷⁰ See James M. Hepbron, *Probation and Penal Treatment in Baltimore* (pamphlet published in June 1927); also, *Quarterly Bulletin of the Baltimore Criminal Justice Commission for the quarter ending March 31, 1928.*

CHAPTER VII

GENERAL JUDICIAL REFORM.

The opinion of several Baltimore lawyers, of reputable standing at the bar, when questioned concerning their impression of the effectiveness of the administration of justice in Maryland, was that it compares favorably with the systems of other American states and gives far more satisfactory results than the average. Only one, probably with keener insight than the others, remarked that there were two outstanding defects in the Maryland system for which he could find no sufficient justification: the requirement that the jury be judge both of the law and the facts in criminal cases, and the refusal to allow the judge in civil cases to instruct the jury orally at the end of the evidence as to the facts and law of the case. After pointing this out, he too remarked that the Maryland system is more efficient than that of many other states, that the judges are of high character, and that the business of the courts progresses regularly.

This general expression of opinion with regard to the judicial system from men who are regularly in contact with it speaks favorably for its work. It does not mean that there is no flaw in the present organization, nor even that it might not be considerably improved upon. The survey made in the previous chapters shows a number of defects both in the general organization of the system and in the procedure in particular parts thereof. The most outstanding ones may be summarized as follows:¹

1. A general lack of unification and centralized control.
2. A regulation of procedure by the constitution and legislative acts (the effect of the Act of 1927 giving the Court of Appeals power to make rules of procedure for civil cases may

¹ The summary is general, and if any suggested defect seems too broad, a reference to the place where it is discussed in the prior chapters will explain its extent. The same applies to the summary of remedies.

be to remedy this), which robs the various courts of the freedom necessary to do justice in particular cases.

3. The preservation of a needless distinction between law and equity as a matter of procedure.

4. A mechanical operation of the law in accord with technical rules that lead to a denial of justice in many instances.

5. Numerous forms of actions and complicated pleadings before the case is brought to trial.

6. The possibility of appeal on technicalities and the opportunity for repeated appeals.

7. The failure of the jury system in most civil cases and its improper use in those where it might be helpful.

8. The lack of power in the judges to exercise a complete control over the course of the case from the start to finish.

9. The popular election of judges for a term of years. (This does not in practice work out as badly in Maryland as in some States.)

10. The lack of attention given to the hearing of petty civil cases in the first instance, which are left largely in the hands of justices of the peace with right of appeal and trial "de novo" before a higher court.

11. Too much contentious delay, and the use of lawyers in minor civil cases.

12. Inequality of the system of court costs and attorney fees as regards rich and poor litigants.

13. The lack of provision for the efficient trial of petty criminal cases in the first instance.

14. The required use of indictment by grand jury in all prosecutions for crime in Baltimore City and many of the counties, and in all felony cases even in those counties where information is allowed as a means of instituting prosecutions for misdemeanors.

15. The retention of the office of coroner.

16. The decentralization of authority for the enforcement of law by having prosecuting officials locally elected, thereby giving a certain amount of local option as to the enforcement of general state law.

17. A lack of adequate records and scientific methods.

These various weaknesses in the system of law administration in Maryland have received mention in the previous discussion with relation to their particular part of the system, and various remedies either taken from the practice of other states or from the suggestions of students of law reform have been described. The most needed improvements and those that seem most likely to give good results are:

1. The complete unification of the court system.
2. The vesting of the rule making power in the courts. (This is mentioned along with the corresponding defect, because the effect of the Act of 1927 giving the power to the Court of Appeals is not yet known and the act can only apply to civil cases.)
3. The abolition of the distinction between law and equity, having one court for all cases with power to give an equitable or legal remedy as the facts may demand without any distinction of procedure in bringing suit.
4. A greater freedom in the judge to reach the justice of a particular case rather than to follow rigid rules of law. With this may be grouped the giving of a greater control to the judge over the whole course of the trial with power to sum up the facts and instruct the jury orally as to the law.
5. The introduction of a single form of action for the bringing of all civil suits, and a general simplification of the pleadings.
6. The provision for only one appeal in all cases, to be allowed in the discretion of the appellate court and not as a matter of right.
7. A reform of the jury system including a limitation of its use in civil cases, a provision for less than a unanimous verdict in all civil and most criminal cases, a more careful selection of persons for jury duty, a limitation of the too liberal right to challenge, and a reform of the practice of having juries judge both the law and the facts in criminal trials.

8. The selection of judges by appointment to hold office during good behavior.

9. The abolition of the justices of the peace as now existing and their reorganization as deputies of a competent judge of each county court, or else their complete abolition and the creation of a small claims court for each county with a competent judge who might go on circuit. The latter plan is preferable, with conciliation as a feature of the court.

10. The abolition of the People's Court of Baltimore and the handling of its work by a small claims and conciliation branch of a unified municipal court for Baltimore.

11. The vesting of all criminal jurisdiction in each county and in Baltimore City in the court for criminal cases (part of a unified system) which might divide for petty cases and those of a higher grade, but which by having complete control of both could establish a uniform policy and secure greater efficiency in all branches of its work.

12. The abolition of the grand jury as the usual means of beginning prosecution of crime and the use of information by the prosecuting attorney.

13. The abolition of the office of coroner and the creation of the office of medical examiner as an agent of the prosecuting attorney's office to take his place.

14. The reorganization of the department of law so as to give it control over and make it responsible for the prosecuting agencies of the State.

15. The creation of a state police force, similar to the state constabulary of Pennsylvania, administratively controlled from the center by a superintendent appointed by the governor with the consent of the senate.

16. The provision for adequate records of all judicial business and annual reports thereof to the Court of Appeals or judicial council.

17. The introduction of conciliation and arbitration as recognized means of settling disputes along the lines discussed in the chapter on quasi-judicial remedies.

18. The maintenance of the judicial council as a skilled body to study the system and keep it in repair.

Many of these improvements deal with particular phases of organization or procedure, and have received a full discussion in connection therewith. Others, going to a complete reform of the system or acting outside thereof have not as yet been discussed in full, particularly the unification of the courts and the maintenance of a judicial council. A more complete study of them will form a satisfactory close for the examination of the possible reforms for our system of judicial administration.

Let us turn, therefore, to a consideration of the complete administrative reform of the courts by having a single unified state court. Probably the best idea of this can be given in the words of Dean Pound:²

The whole judicial power of each state . . . should be vested in one great court of which all tribunals should be branches, departments or divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records, and the like, thus obviating expense to litigants and cost to the public.

Dean Pound then explains this general statement. Three points are involved, namely: organization of the personnel of the judicial department, organization of the judicial business thereof, and organization of its administrative business.

The organization of the personnel should aim to permit the whole judicial force of the commonwealth to be employed in the most effective manner upon the whole judicial business of the commonwealth. There should be specialized judges rather than specialized courts. Multiplication of tribunals has been the first attempt to meet the demands of increased and specialized business. Undoubtedly much specialization is necessary,

² Incorporated in a report of a Special Committee of the American Bar Association to Suggest Laws to Prevent Delay and Unnecessary Cost in Litigation, reprinted in *Journal of the American Judicature Society*, October, 1927.

but the demand may be just as well met by a unified court with specialized judges, to whom special classes of litigation are assigned, as by specialized courts with specialized jurisdiction. Concurrent jurisdictions, jurisdictional lines between courts, with consequent litigation over the forum and the venue at the expense of the merits of the case, and the requirement that the judges do but one thing, no matter how little of that is to be done nor how much of something else, are not the way to provide for the increasing demands. The better way is a single court with specialized judges. As cases of a certain class become numerous and require that a specialist consider them, judges should be designated from the staff of the whole court for that purpose and the causes should be assigned to such judges, in the one court in which all causes are entered, by some functionary whose duty it is to see that the judicial power of the commonwealth is fully utilized to the best advantage.

With the entire judicial power committed to one court, this court should be constituted in three chief branches: (1) county courts or municipal courts; (2) a superior court of first instance; and (3) a single ultimate court of appeal. The first should have exclusive jurisdiction of all petty cases and constitute one great branch for the handling of such work with as many local offices for the filing of papers and as many places for the hearing of causes in each county as the exigencies of business may or shall require. The chief judge, or a rules committee, should from time to time decide when courts should be held and of what nature.

The second branch would be a superior court of first instance with a general original jurisdiction at law, in equity, in probate and administration, in guardianship and kindred matters, and in divorce. It should also have general criminal jurisdiction. Preferably this branch would have three divisions, namely, the law division, the equity or chancery division, and the probate division. Every judge and every division should be able and free to administer whatever relief any other

division or judge might administer, whenever the case warrants it, but, there should be a proper classification of cases as they are entered so that as a rule they would be in the appropriate court.

The third great branch of the court would be a single court of appeal to which causes might go directly for review upon the law from the county courts or from any division of the superior court. All the judges of the commonwealth should be judges of the whole court. No doubt it would be necessary to designate them when chosen as primarily judges assigned to one branch or another. But every judge should be eligible and liable to sit in any branch or division or locality when called upon to do so by the chief justice or other head of the judicial department.

The head of such a unified court would be primarily an administrator supervising the whole work. He would be elected by the people³ and responsible to them for the effectiveness of the system. On the other hand, he would have the power to appoint the judges and officials of the system so that he would have effective control of it. The judges would hold office during good behavior.

Dean Pound summarizes a number of advantages to be obtained by such a unified system which are worth quoting in full:⁴

1. In the first place it would make a real judicial department. The Federal Department of Justice, under the headship of the attorney general gives to the general government something in the line of what is proposed. But it is not in accord with the genius of our legal institutions that one who practices in the courts should be head of a department comprising the courts and charged with the supervision thereof. The several states accordingly have courts, but they do not have any true judicial department.

³ This is Dean Pound's idea of how the head of the system should be selected. The objections could be raised that popular choice might not secure the best man for such a position and theoretically appointment by the governor might be a better way of filling the office. Popular election, however, does more closely uphold the separation of powers in keeping the judicial branch independent of the others and responsible to the people.

⁴ Ibid.

2. It would do away with the waste of judicial power involved in our present system of separate courts with hard and fast personnel.

3. It would do away with the bad practice of throwing causes out of court, to be begun over again, in cases where they were brought or begun in the wrong place. They may be transferred simply and summarily to the proper branch or division, or rules may provide that the cause may be assigned at the outset to the place and the division where it belongs, and no question of jurisdiction of subject matter will stand in the way.

4. It would do away with the great and unnecessary expense involved in transfer of causes, obviating all necessity of transcripts, bills of exceptions, certificates of evidence and the like, and permitting original files, papers, and documents to be used, since each tribunal, as a branch or division of the whole court, may take judicial notice of all files, papers and documents belonging to the court.

5. It would obviate all technicalities, intricacies and pitfalls of appellate procedure. An appeal would be merely a motion for a new trial, or for modification or vacation of the judgment, before another branch of the same great court. It would require no greater formality of procedure than any other motion.

6. It would do away with the unfortunate innovation upon the common law which obtains in many states, by which venue is a place where an action must begin, rather than where it is to be tried, so that a mistake therein may defeat an action entirely, instead of resulting merely in a change of the place of hearing. If all tribunals are parts of one court, there need be nothing beyond a transfer of the cause. All proceedings up to the date thereof may be saved.

7. It would obviate conflicts between judges of coördinate jurisdiction, such as unhappily obtain too often in many localities under a completely decentralized system, which depends wholly upon the good taste and the sense of propriety of individual judges, or the slow processes of appeal to prevent such occurrences.

8. It would allow judges to become specialists in the disposition of particular classes of litigation. This specialization was the real advantage of separate courts of law and equity. Instead of separation between law and equity in procedure, the desirable thing is specialization in administration. The way to obtain this is to organize the courts in such a way that judges may be assigned permanently to work for which they prove most fit. So long as they make the assignment by agreement among themselves, the tendency to follow the line of least resistance will result in the unfortunate practice of periodical rotation.

9. Finally, it would bring about better supervision and control of the administrative officers connected with judicial administration, and make it possible to introduce improved and more business like methods in the making of judicial records and the clerical work of the courts.

To these I should now add two more. It would enable the judicial department to do adequately the work which in desparation of efficient legal disposition, we have been committing more and more to the administrative boards and commissions, which are contrary to the genius of our institutions and often, at best, are mere experiments. It would also make it possible to reconcile the conflicting

claims for judicial responsibility to the people, on the one hand, and for judicial independence, on the other.

A reorganization such as the one suggested by Dean Pound would require radical constitutional changes for its adoption; but radical as it may seem, it provides what should be an efficiently organized system capable of meeting modern demands. If properly placed before the bar and the thinking public, it may sooner or later find entrance into our government.

As yet, the best attempts toward control and reform are to be found in the judicial council movements in various States. In Maryland, the legislature in 1924 provided for the establishing of such a body in this state, and a consideration of that organ and its possibilities will conclude our study with the most recent improvement in our mind.

The act of 1924⁵ provides that there shall be a "Judicial Council" of Maryland consisting of nine members, appointed by the governor, with term of office of three years, with the Chief Judge of the Court of Appeals as President, and with membership as follows: Chief Judge of the Supreme Bench of Baltimore, an associate judge from the Court of Appeals, an associate judge of the Supreme Bench of Baltimore, an associate circuit judge from the Eastern Shore, an associate circuit judge from the Western Shore, and three lawyers engaged in the active practice of law one from Baltimore City and one from each shore.

The council is to make a report to each session of the General Assembly of Maryland upon the work of the various branches of the judicial system, with recommendation for modification of existing conditions. It may also from time to time submit such suggestions as it may deem advisable for the consideration of the judges of the various courts with relation to rules and practice and procedure. It may hold public hearings, administer oaths, and require the attendance of witnesses and the production of books and documents.

⁵ Act of 1924, Ch. 549; Codified as Art. 26, Secs. 74-78 of Md. Code.

The members are not compensated and its budget may not exceed \$1,000 for expenses.

The latter provision limiting the expense account of the council necessarily hampers its powers of investigation, because secretarial aid is necessary for the gathering of the information that the council will need as a working basis. It is to be hoped that the legislature will see fit to allow the council a bit of discretion in the use of funds in carrying on its work. Of course the Maryland Council is too young for one to judge its work, but it is a step in the right direction. Because of the importance of the movement, it is of value to turn our eyes to its development in the United States generally.

At present, there are ten judicial councils operating in various states outside of Maryland, namely: in Massachusetts, Ohio, Oregon, North Carolina, Washington, California, North Dakota, Kansas, Connecticut, and Rhode Island. In addition, there is the Conference of Senior Circuit Judges which is a body of similar powers for the federal system.

The genesis of the judicial council idea is the English Rule Committee, originally created by the Judicature Act of 1875,⁶ and subsequently modified until, in 1909, by the Rule Committee Act,⁷ a committee was organized to consist of two barristers appointed by the General Council of the Bar, two solicitors, one of them appointed by the Incorporated Law Society and the other by the Lord Chancellor, and seven judges in addition to the Lord Chancellor, three or them designated by the act and four appointed by the Lord Chancellor.

Professor Edson R. Sunderland of the University of Michigan acutely describes the effect of the act as follows:

⁶ Sec. 1. This information is secondary, taken largely from an article in the *Journal of the American Judicature Society* for October, 1926, by Charles H. Paul, "The Judicial Council Movement." To bring the information to date, as well as to verify the general conclusion drawn, the author is grateful to an editorial, "The Judicial Council in Movement," published in the *American Bar Association Journal* for August 1925, the manuscript of Mr. W. F. Willoughby on *Judicial Administration*, and other articles in the *Journal of the American Judicature Society*.

⁷ Judicature Act. 1894, Sec. 4.

By the creation of the Rule Committee, responsibility previously scattered, was localized through the addition of active members of the practicing bar, a broader outlook was obtained, and better contacts were established with the commercial communities and with the public generally. These measures obviously promote efficiency and have been adopted in other parts of the British empire.⁸

In the United States the movement may be said to have begun with the action of the Massachusetts legislature in creating in 1919 a commission to investigate the judicature of the commonwealth.⁹ As a direct result of the recommendation of the Judicature Commission appointed under that act,¹⁰ the Massachusetts Judicial Council was established in 1924.¹¹ The council is composed of the Chief Justice of the Supreme Judicial Court, the Chief Justice of the Superior Court, the Judge of the Land Court, one judge of the Probate Court, one Justice of the District Court, and not more than four members of the bar; all to be appointed by the governor with the advice and consent of the executive council. The Chief Justice of the Supreme Court and of the Superior Court and the Judge of the Land Court may designate some other judge or former judge of their respective courts. It is provided in the Massachusetts Act that the Judicial Council shall report annually to the governor "upon the work of the various branches of the judicial system" and that the council may, from time to time "submit for the consideration of the justices of the various courts such suggestions in regard to rules, practice, and procedure as it may deem advisable."¹² It is provided, as is true of all judicial council acts, that the members of the council shall not receive any compensation for their services, but an appropriation for the purpose of "such expenses for clerical and other services, travel and incidentals as the governor and executive council shall approve."¹³

⁸ 22 Mich. Law Rev. 295.

⁹ General Acts of 1919, Ch. 223.

¹⁰ Second and Final Report of the Judicature Commission, 28.

¹¹ General Acts of 1924, Chap. 244, Sec. 34, A-c.

¹² Ibid, Sec. 34 A

¹³ Ibid, Sec. 34 C.

The third annual report of the Judicial Council of Massachusetts was filed with Governor Fuller on December 7, 1927.¹⁴ A glance at this comprehensive bit of work shows the effective work accomplished by the council.¹⁵ The report includes a summary of all cases entered in all the courts of the Commonwealth during the statistical year, an analysis of the cost to the Commonwealth of the administration of justice, a brief study of the business of the various courts, a discussion of the subject of delay in civil cases and various recommendations from a business point of view, a recommendation for the abolition of one cause of delay in criminal cases, reports on three special subjects requested by the legislature, and various other discussions and recommendations of interest in the reform of justice.

This is sufficient to give an insight into the value of the judicial council in the work of law reform and the scope of its powers as it is organized in the various states to date. The acts in most of the states are analogous to that of Massachusetts. The councils, if they keep their present organization, can do little more than study the situation and advise on needed reforms. That it is necessary and important is unquestioned and that the council has a place even if its powers extend no further, is not to be doubted; but still it could be made a more effective organ if it were given power to take direct action.

The Conference of Senior Circuit Judges for the Federal system¹⁶ and the Council as established in California¹⁷ seem to have approached nearest to the Rule Committee as provided for the English system in its possession of powers of direct action. Each of these bodies has the power to equalize the

¹⁴ The full report is Public Document No. 144 to be obtained from the Public Document Room of the Massachusetts State House.

¹⁵ See an article, "The Massachusetts Judicial Council a Success," in the *Journal of the American Judicature Society* for December, 1927.

¹⁶ U. S. Comp. Stat., 1923 Sup., I, Secs. 980, 982, 985, 1113 A.

¹⁷ California Legislature, Forty-Sixth Session, 1925. Final Calendar of Legislative Business, 251; Statutes of California, 1925. Senate Constitutional Amendment No. 15, Ch. 48, 1369-1370 A.

business of the courts within its control by assigning judges of a like or higher jurisdiction to assist a court or judge whose calendar is congested. In a way this means the integration of the entire system of district courts in the federal system, and of the courts of general common law jurisdiction in California, each into a single system in which the individual courts are in effect divisions. In the council, we have the controlling agency through which this unified system is to be made to work.

Prior to this, the remedy that has always been looked to for handling the increasing congestion of business in any particular quarter of a system has been to create new courts, thereby adding expense and complication. The idea of having a supervisory body with power to apportion and shift the judges to courts according to the demands of judicial business, seems to be a more effective way of solving the problems. That this works out in practice may be seen in Maryland from the working of the Supreme Bench in Baltimore City.¹⁸ The writer can see no reason why the same unifying principle could not be applied effectively throughout the counties, nor why the judicial council would not be the logical body in which to vest the control under our present system.

A second provision of interest in the federal act, and one which might well be applied in Maryland as well as in other jurisdictions, calls for the establishment of a system of reports from the several district courts with the result that information is obtainable regarding the work of these tribunals. Apart from the value of such information the requirement that it shall be furnished places a strong moral pressure upon the judges to handle the business coming before them with dispatch to the end that their showing may compare favorably with those of their colleagues. In commenting upon this point Mr. Justice Taft, in his testimony before the committee having the bill in charge at the time it was in process of passage said:

¹⁸ See above, pp. 46-47, for its limited powers of apportioning judges to the various courts of Baltimore City.

It is the introduction into our system of an executive principle to secure effective teamwork. Heretofore each judge has paddled his own canoe and has done the best he could with his district. He has been subject to little supervision, if any. Judges are men and are not so keenly charged with the duty of constant labor that the stimulus of an annual inquiry into what they are doing may not be helpful. With such mild visitation he is likely to cooperate much more readily in an organized effort to get rid of business and do justice than under the "go-as-you-please" system of our federal judges which has left unemployed in easy districts a great deal of the judicial energy that may be now usefully applied elsewhere. . . . This executive principle of using all the judicial force economically and at the points where most needed should be adopted in every state and when adopted will offer a remedy to a great deal of the injustice by delay that now exists. State judges, as well as federal judges, should be interested in the adoption of the federal measure as a model for the states.¹⁹

These words of the Chief Justice put very forcefully the case for a judicial council or committee with powers to apportion judges and receive regular reports of business done. A conferring of such powers on the council in Maryland (though it might take an amendment to the constitution) would add much to the efficiency of the system.

A power that could be effectively handled by the judicial council and one whose control by the English Rule Committee is responsible in large measure for the efficiency of the English system, is that of making rules of procedure for the courts. That this power is one that should be in the courts or better still in a body where practitioners could aid the judges is the opinion of many who have carefully studied the situation,²⁰ and is a view which we have set forth earlier in our discussion.²¹

The interesting thing to note in this connection is how it would be easily possible for the judicial council in Maryland to participate in the making of, if not actually promulgate, new rules of procedure for civil cases. The legislature, as has

¹⁹ Quoted by W. F. Willoughby in Manuscript on Judicial Administration.

²⁰ See a very able article, "The exercise of the Rule Making Power," by Professor Edson R. Sunderland in the *Journal of The American Judicature Society* for October 1926, X, No. 3.

²¹ See above, pp. 82-84.

been noted earlier,²² conferred in 1927 the rulemaking power in civil cases on the Court of Appeals of Maryland. It only remains for the council to assist in the exercise of the function delegated to the Court of Appeals under the authority and sanction of the body. In other words, let the council draw up the necessary plans and have them approved by the Court of Appeals. It is hardly probable that the Court of Appeals would refuse to adopt rules suggested by the council. The court is represented on the council by two judges, one of whom is President of the council. And the council can perform a necessary and important function in educating the bar to its proposals so that its submissions will be thoroughly digested before they reach the court. Should such a coöperation be effected it would amount to following in substance the system that has worked so well in England and in nations of the British Commonwealth.

Undoubtedly the era of the judicial council is here, and that body or a similar one is going to be one of the most constructive influences in the judicial system of our various states. It can and should be such in Maryland.

We realize that mere change is not necessarily progress. Impatience with evils that are apparent creates a tendency to rush to some extreme often worse than the disease. It is often better to make our adjustments in harmony with systems that have stood the test of time, and to make use of agencies already in existence provided these agencies have proved their worth. However, we feel that what was sufficient for one generation or one state of society is not necessarily sufficient or most productive for the present; that changes in the administration of justice in the interests of greater efficiency are needed from time to time as conditions change and new problems develop.

A disregard of this in the past, apparently on the easy going theory on the part of the bar that the situation would somehow take care of itself, accounts in large measure for the

²² See above, p. 84.

lagging of progress in judicial administration behind advances in other fields. Maryland has allowed the field of justice to be overgrown in many spots with weeds, or grass of last season's sowing. On the other hand, some of the most advanced reforms are present in our system, and the legislature is beginning to see that if the wheels of progress are to turn freely the wheels of justice must be unlocked. The establishment of a judicial council and the giving of the rulemaking power to the Court of Appeals in civil cases may indicate the first steps in the direction of making systematic provision for the general direction and control of the judicial branch from the standpoint of efficient administration.

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VITA

George Kenneth Reiblich was born in Baltimore, Maryland on May 4, 1905. He received his preliminary education in the public schools, including the Catonsville High School, of Baltimore County, where he has resided since he was six years of age. In 1921 he entered the College of Arts and Sciences of the Johns Hopkins University, from which he received the Degree of Bachelor of Arts in June, 1925. The same year he enrolled as a Graduate Student in the Department of Political Science, and also entered the Law School of the University of Maryland.

